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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DEFENDERS OF WILDLIFE AND SIERRA CLUB,

Petitioners,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY

Respondent.

On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 8 U.S.C. § 1103 note, provides that "the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the" physical barriers and associated roads along the United States' border that are authorized by that provision. The statute expressly precludes actions seeking judicial review of a waiver for failure to comply with the statutory standard and permits only suits alleging constitutional violations. This action presents a constitutional challenge to the Secretary's decision waiving nineteen federal laws, and all state and local legal requirements related to them, in connection with the construction of a barrier along a portion of the border with Mexico.

The questions presented are:

1. Whether the preclusion of judicial review renders Section 102(c)'s grant of expansive waiver authority to the Secretary of Homeland Security an unconstitutional delegation of legislative power.

2. Whether Section 102(c)'s grant of waiver authority violates Article I's requirement that a duly-enacted law may be repealed only by legislation approved by both Houses of Congress and presented to the President.

RULE 29.6 STATEMENT

Defenders of Wildlife and Sierra Club state that neither organization has a parent corporation and no publicly-held corporation owns 10% or more of the stock of either organization.

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OPINION BELOW

The opinion of the district court (App., *infra*, 1a-20a) is reported at 527 F. Supp. 2d 119.

JURISDICTION

The judgment of the district court was entered on December 18, 2007. This Court's jurisdiction rests on Section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note.

STATUTORY PROVISION INVOLVED

Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note, provides in relevant part:

> (a) The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.
>
> * * * *
>
> (c)(1) Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.
>
> * * * *

(2)(A) The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

* * * *

(C) An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

STATEMENT

Section 102 of IIRIRA delegates extraordinarily broad authority to the Secretary of Homeland Security. He may waive any statute or legal requirement—federal, state, or local—that otherwise would apply to the actions of the government, or of anyone else, in constructing the border fence if in the Secretary's "sole discretion" he finds such a waiver "necessary to ensure expeditious construction." And there is no judicial review to determine whether the Secretary's waiver decision accords with the statutory standard.

This constitutional challenge to this statute delegating unprecedented power presents important questions regarding fundamental separation of powers principles. "Liberty is always as stake when one or more of the branches seek to transgress the separation of powers * * *. By increasing * * * power * * * beyond what the Framers envisioned, [a] statute

compromise[s] the political liberty of our citizens, liberty which the separation of powers seeks to secure." *Clinton* v. *City of New York*, 524 U.S. 417, 450, 452 (Kennedy, J., concurring).

Section 102 violates the separation of powers in two ways. First, a delegation of authority can satisfy the "intelligible principle" standard only if the Executive's actions are subject to judicial review to ensure that they comport with the standard established by Congress. Indeed, the entire purpose of the requirement of a statutory principle is to be able "in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus* v. *United States*, 321 U.S. 414, 426 (1944). The absence of judicial review here is therefore fatal to Section 102 under the nondelegation doctrine.

Second, as in *Clinton*, the delegation of authority here bypasses the Constitution's process for amending or repealing a law and instead endows the Secretary of Homeland Security with authority to void any federal law, free of any review of his determinations. That effectively gives the Secretary legislative power equivalent to that exercised by Congress and therefore is invalid under *Clinton*.

This Court's intervention is necessary because of another unique aspect of this statute: Congress eliminated all appeals as of right in constitutional challenges to Section 102. Congress's decision to bypass the courts of appeals means this Court is the only forum that can reconcile the contradictory legal principles applied by the district court here and by the courts of appeals in other cases holding that the availability of judicial review is essential to satisfy the "intelligible principle" standard. Review by this Court is therefore plainly warranted.

A. Statutory Background

Congress in 1996 directed the Attorney General to "install additional physical barriers and roads * * * in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, tit. I, § 102, 110 Stat. 3009, 3009-554 (codified as amended at 8 U.S.C. § 1103 note). The first such barrier was to be constructed "along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending eastward" in the vicinity of San Diego. *Id.* § 102(b)(1).

The statute authorized the Attorney General to waive the provisions of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531 *et seq.*, and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, to the extent "necessary to ensure expeditious construction of the barriers and roads" at the border. 8 U.S.C. § 1103 note. The Attorney General never exercised this authority during construction of the San Diego border fence; indeed, the Bureau of Customs and Border Protection ("CBP") undertook to comply with NEPA and ESA.[1]

Congress in 2005 amended Section 102 of IIRIRA to grant to the Secretary of Homeland Security[2] au-

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[1] Cal. Coastal Comm'n, W13a Staff Report and Recommendation on Consistency Determination 14 (CD-063-03) (Oct. 2003); Blas Nuñez-Neto & Michael John Garcia, *Border Security: Barriers Along the U.S. International Border* 6 (Cong. Research Serv. Jan. 8, 2008).

[2] A series of amendments, including the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, transferred many

thority to waive "***all*** legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads." REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, § 102, 119 Stat. 231, 306 (emphasis added). The provision also precluded all judicial review of any claim that a waiver under Section 102 exceeded the scope of the Secretary's delegated authority. It permitted the district courts to hear constitutional challenges, but eliminated appeals as of right to the courts of appeals, providing only for certiorari review by this Court of the district court's resolution of constitutional challenges. *Id.* § 102(c)(2).

B. Administrative Actions And Proceedings Below

The Army Corps of Engineers began construction in September 2007 of a border fence in the San Pedro Riparian National Conservation Area ("SPRNCA"), acting under instructions from the Department of Homeland Security. App., *infra*, 2a. The SPRNCA region is one of the most biologically diverse areas of the United States, containing more than 100 species of breeding birds and an additional 250 species of migrant and wintering birds.The National Audubon Society recognized the San Pedro area as its first "Globally Important Bird Area" and the United Nations World Heritage Program designated the area a "world heritage natural area." *See,* UNITED STATES BUREAU OF LAND MANAGEMENT, SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA, DESCRIPTION http://www.blm.gov/az/st/en/prog/blm_special_areas/ncarea/sprnca.html.

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of the Attorney General's functions under IIRIRA to the Secretary of Homeland Security.

The Department of Homeland Security sought from the Bureau of Land Management ("BLM") a perpetual right of way for the San Pedro border fence. Under the NEPA, BLM is obligated to conduct an initial environmental assessment before granting a right of way and then undertake a further and more detailed environmental impact statement ("EIS") if the agency's proposed action may result in significant environmental impacts. 42 U.S.C. § 4332(C); 40 C.F.R. § 1501. Despite the fact that its environmental assessment disclosed the possibility of serious impacts to the soils and natural resources of the SPRNCA, BLM decided not to prepare an EIS and granted the right of way allowing construction of the fence along most of the SPRNCA's southern border. App., *infra*, at 2a.

After the Department of the Interior failed to act on petitioners' request for an administrative stay of the fence construction, petitioners filed this action in the District Court for the District of Columbia under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, challenging the BLM's failure to comply with NEPA. They also argued that the grant of the right of way violated the Arizona-Idaho Conservation Act of 1988, 16 U.S.C. § 460xx-1, which requires the BLM to manage the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area" and to "only allow such uses of the conservation area" that further the purposes for which it was established.

Finding that petitioners had demonstrated a substantial likelihood of success on their claims of statutory violations, the District Court for the District of Columbia granted petitioners' motion for a tempo-

rary restraining order barring construction of the fence. App., *infra*, 3a.

Two weeks after the issuance of the temporary restraining order, the Secretary invoked his authority under Section 102(c) of IIRIRA to waive "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" NEPA, the Arizona-Idaho Conservation Act, and seventeen other laws, including the entirety of the APA.[3] He asserted that the waiver of these laws in the SPRNCA was "necessary * * * to ensure the expeditious construction of the barriers and roads," but provided no explanation of the reasons for that determination. 72 Fed. Reg. 60,870 (Oct. 26, 2007).

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[3] The other laws are: the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C. § 1251 *et seq.*; the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*; the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the Archeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.*; the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; the Noise Control Act, 42 U.S.C. § 4901 *et seq.*; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*; the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*; the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; the Archaeological and Historic Preservation Act, 16 U.S.C. § 469 *et seq.*; the Antiquities Act, 16 U.S.C. § 431 *et seq.*; the Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 *et seq.*; the Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.*; and the Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq.*

Following issuance of the waiver, the district court vacated the temporary restraining order. Petitioners then amended their complaint, asserting that the waiver was invalid because Section 102's grant of waiver authority violated separation of powers principles. App., *infra*, 6a.

The district court dismissed the action, holding that the grant of waiver authority did not violate the separation of powers. App., *infra*. 1a-20a. It first rejected petitioners' argument that the waiver provision is invalid on grounds similar to the Line Item Veto Act held unconstitutional in *Clinton* v. *City of New York*. The court held that "the waiver provision at issue here is not equivalent to the power to amend or repeal duly enacted laws. And therefore the holding of *Clinton* is inapplicable." *Id.* at 12a.

Next, the court considered petitioners' argument that the waiver authority "is an unconstitutional delegation of legislative authority to the Executive Branch." *Id.* at 13a. Notwithstanding the "unlimited number of statutes that could potentially be encompassed by the Secretary's exercise of his waiver power," and the absence of any opportunity for a judicial determination whether the Secretary's actions complied with the statutory standard, the court concluded that the delegation is permissible because "the Legislative Branch has laid down an intelligible principle to guide the Executive Branch * * *." *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

The extraordinarily broad delegation of authority at issue here violates the Constitution's separation of powers principles in two distinct ways. First, this Court's decisions upholding broad delegations of authority against constitutional challenge consistently point to the assurance—provided by the availability of judicial review of administrative action—that the administrative agency would comply with the statutory standard prescribed by Congress for exercise of that authority. There is no such assurance here. Rather, Congress has expressly precluded such judicial review. This Court has ***never*** upheld a broad delegation in the absence of judicial review; neither has any court of appeals.

This serious flaw is magnified further by Section 102's serious intrusion on federalism interests. The district court's decision leaves the Secretary with power to waive state and local laws, as he has in this case (see page 7, *supra*). The breadth of that preemptive authority—unconstrained by any judicial review—confirms the legislative character of the extraordinarily broad power conferred on the Secretary.

Second, the delegation of authority here suffers from the same defect as the line item veto invalidated in *Clinton*—it impermissibly bypasses the constitutionally-mandated procedure for enacting, amending or repealing a law by allowing the Secretary to act as a super-legislature, exercising omnibus authority to void ***any*** duly enacted law in any way applicable to building the border fence, free of any review of those determinations. That is the essence of a legislative act.

This Court's intervention to correct the lower court's erroneous decision is plainly warranted for several reasons. The constitutional issue presented here reaches to the heart of the principle of separation of powers that underlies our Nation's framework of democratic governance. The power to enact, amend, and repeal the laws is the quintessential legislative power vested exclusively in Congress by Article I. The authority granted to the Secretary by Section 102(c) effectively permits the Executive Branch to exercise that legislative authority, in defiance of this basic constitutional structure.

In addition, this Court's decision whether to grant review must take account of Section 102(c)'s virtually unprecedented elimination of any appeal as of right of petitioners' constitutional claims. If petitioners were in the same position as other litigants in the federal courts, and able to appeal as of right to the D.C. Circuit, that court would either invalidate the waiver authority or—by upholding the district court's ruling—create a conflict with the decisions of other courts of appeals that have struck down broad delegations without judicial review, a conflict that would warrant this Court's attention. Congress's elimination of any appeal as of right, either to the courts of appeals or to this Court, leaves discretionary review by this Court as the only means of obtaining a definitive resolution of this serious constitutional question.

Finally, the broad geographic reach of the fence project—stretching thousands of miles along the Nation's borders—is likely to produce a parade of decisions from different district courts. Because decisions by district court judges do not bind other district court judges, whether within or outside the same district, Congress's elimination of court of appeals' re-

view leaves only this Court with the ability to resolve the important constitutional issues raised by Section 102. Indeed, only this Court can resolve the conflict between the decision below and the courts of appeals that have addressed the issue presented here in different statutory contexts. These factors, along with substantial questions about the Secretary's compliance with the statutory "necessity" standard—prompted in part by the Secretary's failure to provide any justification whatever for most of the statutes waived here—combine to necessitate review by this Court.[4]

A. The Secretary's Expansive Authority To Waive Any Federal, State, Or Local Legal Requirement Violates The Constitution's Separation Of Powers.

Section 102's enormous delegation of power is unprecedented. Not only does the waiver authority extend to every federal, state, and local legal requirement, but the statute provides no right to a judicial determination that the Secretary's exercise of this authority complies with the standard established by

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[4] Construction has been substantially completed with respect to the portion of the fence challenged in this lawsuit, but petitioners' claims are not moot. A case becomes moot only where "a court * * * cannot grant 'any effectual relief whatever.'" *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). If petitioners prevail on their claim before this Court that the Secretary's action waiving NEPA and other laws was unconstitutional, petitioners can seek effective remedies under those laws to mitigate or avoid the harms threatened by the fence, including substitution of vehicle barriers in appropriate locations, such as streambeds, to allow wildlife passage and reduce serious hydrological damage during high rainfall events.

Congress. For that reason, this broad delegation of authority violates the principles recognized in the well-established nondelegation doctrine. The unchecked and unreviewable authority to waive any federal law in this case also violates the Constitution's clear command, recognized by this Court in *Clinton* v. *City of New York*, that Congress may not confer upon the Executive Branch the power to repeal duly-enacted statutes.

1. Conferring Broad Administrative Authority Without Judicial Review To Check Compliance With The Statutory Standard Constitutes An Unconstitutional Delegation Of Legislative Power.

This Court consistently has held that Congress may delegate broad power to the Executive Branch only if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)).

The intelligible principle standard is not a formalistic requirement necessitating only the inclusion in the statutory delegation of an acceptable incantation. What is essential to avoid an unconstitutional delegation is that the congressionally-specified limitation effectively constrain the Executive's use of the delegated authority.

Judicial review is the only effective means of ensuring that Congress's restrictions are obeyed. For that reason, this Court has expressly linked the intelligible principle standard and judicial review, stating that delegations may be upheld "so long as Con-

gress provides an administrative agency with standards guiding its actions ***such that a court could 'ascertain whether the will of Congress has been obeyed.'"*** *Skinner* v. *Mid-Am. Pipeline Co.*, 490 U.S. 212, 216 (1989) (emphasis added) (quoting *Mistretta* v. *United States*, 488 U.S. 361, 379 (1989)). This Court has never upheld a delegation of broad authority such as Section 102 that unequivocally precludes all judicial review to assess the Executive's compliance with Congress's constraining principle.

a. The "Intelligible Principle" Standard Requires Judicial Review To Ensure Agency Compliance With Congressional Delegations Of Authority.

The Court repeatedly has recognized the critical importance of judicial review in upholding broad grants of administrative authority against nondelegation challenges. In *Yakus* v. *United States*, 321 U.S. at 436, for example, the Court explained that Congress's standard for the Executive's exercise of the delegated authority must be sufficiently intelligible so that it is possible "in a proper proceeding to ascertain whether the will of Congress has been obeyed." The Court has adhered to that explanation in more recent decisions. See *Skinner*, 490 U.S. at 216; *Mistretta*, 488 U.S. at 379.

The Court's willingness to uphold delegations constrained by broad statutory principles is thus predicated on the availability of judicial review to give those principles concrete meaning:

> The legislative process would frequently bog down if Congress were constitutionally required to appraise before-hand the myriad situations to which it wishes a particular pol-

> icy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules * * *. ***Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.***

Am. Power & Light Co. v. *SEC*, 329 U.S. 90, 105 (1946) (emphasis added).

Touby v. *United States*, 500 U.S. 160 (1991), confirms this conclusion. There, a delegation of authority permitting the Attorney General to schedule a drug as a controlled substance temporarily was challenged on the ground that "the purpose of requiring an 'intelligible principle' is to permit judicial review," but the statute precluded judicial review of these temporary scheduling orders. *Id.* at 168. This Court did not dispute that judicial review is required; it found that the opportunity to challenge a temporary scheduling order in the context of a criminal prosecution was "sufficient to permit a court to ascertain whether the will of Congress has been obeyed." *Ibid.* (quotations omitted). See also *id.* at 170 (Marshall, J., concurring) ("judicial review perfects a delegated lawmaking scheme by assuring that the exercise of such power remains within statutory bounds").

The absence of judicial review, on the other hand, has been a factor in the Court's decisions striking down statutes on nondelegation grounds. In *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 533 (1935), the Court rejected a delegation of authority to the President to establish "codes of fair competition" regulating a trade or industry, noting in part that the new scheme lacked the safeguards of analogous Federal Trade Commission (FTC) deter-

minations, which included "judicial review [of FTC decisions] to give assurance that the action of the Commission is taken within its statutory authority." *Ibid.* *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), involved a provision of the National Recovery Act authorizing the President to ban interstate shipments of oil produced in violation of state law. The Court emphasized that an agency exercising delegated authority must both be constrained by a "necessary principle that * * * an agency * * * pursue the procedure and rules enjoined" and "show a substantial compliance therewith to give validity to its action." *Id.* at 432.

Lower courts also have consistently pointed to the importance of judicial review to upholding broad delegations of authority to agencies. *United States* v. *Pastor*, 557 F.2d 930, 941 (2d Cir. 1977) (rejecting nondelegation challenge because "[t]he procedures prescribed by Congress for regulation of the Attorney General's decision, coupled with the availability of judicial review [under the statutory scheme] * * * assure that the delegatee will not act capriciously or arbitrarily"); *United States* v. *Gordon*, 580 F.2d 827, 839 (5th Cir. 1978) (same); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) ("The safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers."). See also *South Dakota* v. *Dep't of Interior*, 69 F.3d 878, 881 (8th Cir. 1995) (invalidating provision on nondelegation grounds; court based its decision on the absence judicial review), *vacated*, 519 U.S. 919 (1996);[5] *Unit-*

[5] Following the court of appeals' decision, the Secretary of the Interior promulgated a regulation providing for judicial review of his administrative determinations, and the Solicitor General

ed States v. *Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994) (observing that "judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge" and rejecting nondelegation challenge due to availability of judicial review); *United States* v. *Widdowson*, 916 F.2d 587, 591 (10th Cir. 1990) (striking down, on nondelegation grounds, statute at issue in *Touby* because of lack of judicial review), *vacated*, 502 U.S. 801 (1991) (remanding for reconsideration in light of *Touby*'s holding that sufficient judicial review was available).[6]

This requirement of judicial review is especially important here in view of the Secretary's conclusion that Section 102 empowers him to waive not just federal law, but also "state, or other laws, regulations and legal requirements of, deriving from, or related to the subject" of nineteen specified federal statutes. 72 Fed. Reg. 60870 (Oct. 26, 2007). The scope of "an

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filed a certiorari petition stating that the court of appeals' decision rested in part on the lack of judicial review and urging this Court to grant review, vacate the lower court's decision, and remand the case to the Secretary for reconsideration in light of the new regulation. The Court did just that. *Dep't of the Interior* v. *South Dakota*, 519 U.S. 919 (1996). The government's actions themselves confirm the importance of judicial review to the nondelegation inquiry.

[6] Although the Ninth Circuit in *United States* v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992), rejected a nondelegation challenge to the Export Administration Act notwithstanding the statutory preclusion of review, the court rested its decision on its determination that "the Act * * * permit[s] courts to review * * * claims that the Secretary has acted completely outside the scope of his delegated powers" (*id.* at 1038)—thus recognizing that some judicial oversight of the Executive's exercise of delegated authority is necessary to satisfy the constitutional standard.

administrative agency's power to preempt state laws * * * affects the allocation of powers among sovereigns." *Watters* v. *Wachovia Bank*, 127 S. Ct. 1559, 1585 (2007) (Stevens, J., joined by Roberts, C.J., and Scalia, J., dissenting). Without judicial review, however, the Secretary will be free to preempt any state law he chooses, with no check to assure that his actions are consistent with Congress's delegation of authority.

b. Delegations Without Judicial Review Have Been Upheld Only In The Limited Circumstances In Which The "Intelligible Principle" Requirement Does Not Apply.

Congress need not prescribe an intelligible principle to guide administrative action with respect to narrow delegations that fall within the "certain degree of discretion, and thus of lawmaking, [that] inheres in most executive or judicial action." *Whitman*, 531 U.S. at 475 (2001). See also *ibid.* (stating that Congress "need not provide any direction" for extremely limited agency actions). Because judicial review is linked to the intelligible principle requirement, the Court has not required administrative actions of this type to be subject to judicial review.

Questions about the availability of judicial review of administrative action typically come before this Court as issues under the provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* That statute provides that judicial review is not available when review is precluded by statute (Section 701(a)(1)), or when "agency action is committed to agency discretion by law" (Section 701(a)(2)).

The Court has not found judicial review precluded by statute when the administrative action in ques-

tion was grounded in a broad delegation subject to the intelligible principle requirement. To the contrary, the Court has strained to find judicial review in those circumstances. See, *e.g.*, *Reno* v. *Catholic Social Services*, 509 U.S. 43 (1993) (construing the provision precluding review narrowly, and permitting judicial review of administrative decisions that did not involve individual applications for status adjustment).

The preclusion of review contemplated by Section 701(a)(2) involves situations in which there is "no law to apply" in assessing the permissibility of agency action. *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971). That can occur only with respect to administrative actions that need ***not*** be constrained by a congressionally articulated "intelligible principle." See generally Viktoria Lovei, Comment, *Revealing the Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. Chi. L. Rev. 1047, 1065-67 (2006). Where an intelligible principle is not necessary, neither is judicial review.

For example, the Court has upheld discretionary action unconstrained by an "intelligible principle" and therefore appropriately exempt from judicial review under Section 701(a)(2) where the actions in question fall within the inherent authority of the Executive Branch. In holding an employment termination decision by the CIA Director unreviewable on statutory grounds, for example, the Court in *Webster* v. *Doe*, 486 U.S. 592, 601 (1988), emphasized the inherent discretion necessary to effectuate the mission of the CIA, noting that "the Agency's efficacy, and the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's

employees."[7] See also *Heckler* v. *Chaney*, 470 U.S. 821, 831-32, 837-38 (1985) (recognizing that Section 701(a)(2) preclusion is appropriate because the Executive's prosecutorial function is appropriately insulated from judicially enforceable legislative standards).

Section 102 does not resemble these narrow situations. Rather it involves an extremely broad delegation of authority that the government has recognized is subject to the "intelligible principle" standard. Reply Mem. in Supp. of Defs. Renewed Mot. To Dismiss 13-15 (Nov. 27, 2007). Because judicial review is an essential element of that standard, and that review is expressly precluded here, the waiver authority violates the nondelegation doctrine.

2. *Section 102's Stand-Alone, Omnibus Waiver Authority Violates Art. I, § 7 Of The Constitution.*

Section 102(c) resembles—and suffers from the same constitutional flaw as—the line item veto provision held unconstitutional in *Clinton* v. *City of New York*, 524 U.S. 417 (1998). Like the statute at issue in *Clinton*, therefore, it cannot stand.

The essential characteristic of the authority conferred on the President by the Line Item Veto Act, 2

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[7] The narrow authority of the CIA Director to terminate the employment of individuals working in intelligence cannot reasonably be equated with the authority of the DHS Secretary to unilaterally waive "all legal requirements" at the federal, state, or local level that he might deem, in his sole discretion, to be in some way related to the construction of the San Pedro fence. The former is the exercise of discretion inherent in executive action not subject to the intelligible principle requirement; the latter is exceedingly broad and is permissible only if Congress provides the requisite principle and associated judicial review.

U.S.C. § 691 *et seq.*, is that it gave the President "the power to 'cancel in whole' three types of provisions" that had been "signed into law"—budget authority, direct spending, and tax benefits. *Clinton*, 524 U.S. at 436. "With respect to both an item of new direct spending and a limited tax benefit, the cancellation prevent[ed] the item 'from having legal force or effect.'" *Id.* at 437. "In both legal and practical effect," the Court concluded, "the President['s cancellation of provisions in two statutes] has amended two Acts of Congress by repealing a portion of each." *Id.* at 438.

The Court found "important differences" between the process specified in the Constitution (Art. I, § 7) for the President's "return" of a bill to Congress and his exercise of the cancellation authority:

> The constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

Clinton, 524 U.S. at 439. "What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the 'finely wrought' procedures that the Framers designed." *Id.* at 440. See also *INS* v. *Chadha*, 462 U.S. 919, 954 (1983) ("repeal of statutes, no less than enactment, must conform with Art. I").

Section 102 has all of the characteristics that the Court identified as objectionable in *Clinton*. It authorizes the Secretary to "cancel[]" any previously-enacted law and thereby deprive it of "legal force and effect" with respect to the construction of the border fence. *Clinton*, 524 U.S. at 437 (quotation marks omitted). The effect of those previously-enacted laws is thus "truncated" as a result of the Secretary's administrative action, not as a result of the procedure specified in the Constitution for the repeal of statutes by Congress. *Id.* at 440.

As in *Clinton*, Section 102 cannot be saved on the basis of *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892), in which the Court upheld the Tariff Act against a constitutional challenge. The Tariff Act authorized the president to suspend exemptions on export duties "for such time as he shall deem just" for any countries which impose upon products of United States duties which he "deem[s] to be reciprocally unequal and unjust." *Id.* at 689 (quotation marks omitted).

The Tariff Act provision was narrowly focused—permitting only the waiver of requirements imposed by the very statute in which the waiver provision was contained. Section 102, by contrast, is free-standing; confers extraordinarily broad authority to waive ***any*** federal, state, or local law or legal requirement; and exempts the Secretary's action from any judicial review other than for constitutional defect.

Section 102's free-standing nature; its unique omnibus applicability to any law or legal requirement that otherwise would govern the Executive

Branch's actions in constructing the fence,[8] and the absence of judicial review carry all of the essential characteristics of legislative action. Statutes enacted by Congress are reviewed only for constitutional defect; administrative action, however, typically is subject to judicial review for compliance with statutory standards. And Congress has plenary power to amend or repeal existing statutes—or to enact new measures—to address any subject within its broad constitutional authority; administrative waiver authority typically is focused on the requirements imposed by the particular statute granting the authority or similar statutes.

The district court below pointed to a number of waiver provisions, suggesting that because petitioners did not "question[] Congress's ability to confer the waiver power in these circumstances," the Section 102 waiver authority is similarly beyond question. App., *infra*, 10a. But none of the waiver provisions cited by the district court (*id.* at 10a n.5), are as un-

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[8] The authority to waive "any legal requirement," local, state, or federal, in its entirety, while precluding statutory judicial review, appears to be unprecedented. Memorandum from Stephen R. Viña & Todd Tatelman, Legislative Attorneys, Am. Law Division, Cong. Research Serv. on Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 2-4 (Feb. 9, 2005); Blas Nuñez-Neto & Stephen Viña, *Border Security: Barriers Along the U.S. International Border* 8 (Cong. Research Serv. Dec. 12, 2006).

Other waiver provisions are cabined by (1) allowing waiver only of statutory requirements contained in the same statute that authorizes the waiver, (2) specifically enumerating the laws that may be waived, or (3) allowing waiver only of a grouping of similar laws. Nuñez-Neto & Viña, *supra*, at 8. See, *e.g.*, 10 U.S.C. § 1107(a); 22 U.S.C. § 2375(d); 29 U.S.C. § 793; 42 U.S.C. § 6212(b); 42 U.S.C. § 6393(a)(2); 50 U.S.C. § 2426(e).

constrained as Section 102—they are limited to a specific law or category of laws and none expressly precludes judicial review.[9] Like the waiver authority at issue in *Field*, they provide no basis for sustaining Section 102's broad grant of power.

The Secretary's modifications of existing laws are no less intrusive on the constitutional scheme than the line item vetoes at issue in *Clinton*. Unlike rulemaking or adjudicatory power, which authorizes agencies to create rules and standards in certain specialized fields, authorizing an Executive Branch official selectively to repeal *any* existing law that otherwise would constrain his action, without any judicial review to determine whether he has complied with the standard set by Congress, raises un-

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[9] The Intelligence Authorization Act of 1991, 10 U.S.C. § 433, for instance, explicitly confines the laws that can be waived to those "pertaining to the management and administration of Federal agencies" and the authority expired after four years. The Toxic Substances Control Act of 1976, 15 U.S.C. § 2621, confined its waiver authority to other provisions of the act itself and required congressional notification as well as a written record of the waiver's basis for in camera review in judicial proceedings. The Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7207(a)(3), simply permits the President to lift restrictions on aid to Iran, Libya, North Korea, and Sudan for national security or humanitarian reasons. Section 7117 of the No Child Left Behind Act of 2001, 20 U.S.C. § 7426(e), again confines the waiver authority to only a "regulation, policy, or procedure promulgated by that department [responsible for providing education and related services provided to Indian students]."

The waiver provision in the Trans-Alaskan Pipeline Authorization Act ("TAPAA"), 43 U.S.C. § 1652, is broad, but its exercise is expressly subject to judicial review for compliance with the standard specified by Congress. See *id.* § 1652(d).

precedented lawmaking concerns. See *The Federalist No. 47*, at 301 (James Madison) (C. Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands * * * may justly be pronounced the very definition of tyranny."). Because the sweeping waiver power conveyed by Section 102 permits the Secretary effectively to place himself above all existing law—and thus expands Executive authority beyond the bounds of Article II—*Clinton* requires the invalidation of Section 102.

B. The Questions Presented Are Both Legally Significant And Practically Important.

The extraordinary elimination of any appeal as of right with respect to the constitutional questions presented here means that the important issues raised by Section 102—issues on which courts of appeals have reached conclusions different from the court below—can be resolved only by this Court's intervention. Congress's decision to bypass the courts of appeals does not weigh against review by this Court; to the contrary, it is a factor strongly favoring a grant of certiorari here.

Moreover, the questions regarding the constitutionality of Section 102 presented here inevitably will recur as the Secretary issues new waivers, which then are challenged in various district courts in the seventeen States that may contain segments of the border fence. Because no district court's resolution of these issues will be binding on the next district court to consider them, a decision by this Court is the only way to prevent this duplicative litigation. Review by this Court is therefore plainly warranted.

1. Section 102(c)'s Virtually Unprecedented Restriction Of Appellate Review Necessitates This Court's Intervention.

Congress's approach to appellate review for cases involving Section 102(c), combined with the state of the law in the lower courts, warrants review by this Court to address the clear inconsistency between the decision below and the decisions of the courts of appeals.

As a threshold matter, the elimination of an appeal as of right—either to the courts of appeals or to this Court—sharply distinguishes this case from the norm in the federal system. Generally, when Congress bypasses the courts of appeals it provides for a direct appeal to this Court.[10] Here, however, it provided only for discretionary review on certiorari. As far as we have been able to determine, that approach is virtually unprecedented.[11]

Were this case reviewable by the D.C. Circuit, that court might well be expected to follow the reasoning of the other courts of appeals in finding seri-

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[10] See, *e.g.*, Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. §§ 901 & 922(a)(5)(b) (granting that decisions of the district court "shall be reviewable by appeal directly to the Supreme Court of the United States" and creating a "duty" for the district court and the Supreme Court "to advance on the docket and to expedite to the greatest possible extent the disposition" of any case challenging the constitutionality of the Act); Line Item Veto Act of 1996, 2 U.S.C. § 692(b) & (c) (same).

[11] The only other example we have located is the Trans-Alaskan Pipeline Authorization Act. See 43 U.S.C. § 1652. But the TAPAA—unlike Section 102(c) of IIRIRA—permitted the district court to adjudicate claims that the agency had exceeded its own statutory authority. See note 9, *supra*.

ous constitutional problems with a statute, like Section 102(c), that absolutely precludes review for compliance with Congress's mandate (see pages 15-16, *supra*). Alternatively, the D.C. Circuit might have affirmed the lower court, creating a conflict among the courts of appeals on this question that would warrant review by this Court.

The lack of any opportunity for appellate review, combined with the conflict between the result here and the approach taken by other courts and the importance of the legal issue, provides a strong justification for review by this Court. The opposite approach—denying review on the ground that there has been no decision by a court of appeals—would mean that Congress's decision to preclude an appeal as of right would effectively preclude review by this Court as well. The Court should reject that result and grant review.

2. *Review Is Necessary To Resolve Conclusively The Constitutionality Of The Section 102 Waiver Authority.*

Without review by this Court, relitigation of the serious, unsettled constitutional questions raised by Section 102 is likely to recur with each exercise of the Secretary's waiver authority. And given the length of the Nation's borders, that authority may well be exercised with considerable frequency.

The waiver authority applies generally to all barriers and roads "in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." 8 U.S.C. § 1103 note. Thus, it potentially encompasses an area far in excess of the length of the southern border alone. Blas Nuñez-Neto & Stephen Viña, *Border Security: Fences Along the U.S. International Border* 1-2

(Cong. Research Serv. Jan. 11, 2006) (indicating that the "San Diego sector" comprises some 7000 square miles).

Indeed, Congress recently mandated construction of a barrier along at least 700 miles of the southwest border. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844. The project is already garnering significant attention, and expansion of the fence is expected. See, *e.g.*, Kevin Johnson, *In Southwest Fixing the Fence Never Ends*, USA Today, Sept. 16, 2007, at 1A.

The Secretary inevitably will issue additional waivers in connection with construction of these additional segments of the border fence. The waiver at issue here is not the only one issued thus far. See 72 Fed. Reg. 2535 (Jan. 19, 2007) (waiving federal, state, and other laws with respect to construction in the Barry M. Goldwater Range in Arizona). And *Sierra Club* v. *Ashcroft*, No. 04-0272, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005), involved a virtually identical constitutional challenge to waiver authority under a predecessor statute of Section 102(c).

While a district court decision resolves the particular controversy before the court, it lacks precedential effect. See, *e.g.*, *Gould* v. *Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) (Posner, J.) ("[a] district court decision binds no judge in any other case, save to the extent that doctrines of preclusion (not stare decisis)"); *Fox* v. *Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) ("[a] district court is not bound by another district court's decision, or even an opinion by another judge of the same district court") (quotation marks omitted).

Continued litigation in district courts that apply varying standards fosters duplicative lawsuits and creates uncertainty. Congress did not restrict constitutional challenges to the waiver authority to the District Court for the District of Columbia, meaning that each district court in which a controversy arises—and the fence could run through a multitude of district courts in seventeen States—will have to resolve the legal issues anew. The preclusion of appellate review creates the potential for conflicting judicial determinations in each individual judicial district that shares a border with Canada or Mexico.

This repeated litigation is wasteful—of both judicial resources and the resources of the parties. This Court should intervene to resolve the issue.

3. Review Is Particularly Appropriate Here Because There Are Strong Indications That The Secretary's Waiver Exceeded His Statutory Authority.

The impact of the unconstitutional preclusion of judicial review is particularly egregious here because it is far from clear that the Secretary's waiver complies with the statutory standard.

The Secretary provided no explanation whatever for his decision. The order simply contains the conclusory assertion that he determined the waiver to be "necessary." 72 Fed. Reg. 60,870 (Oct. 26, 2007).

In particular, there is no explanation why it was "necessary" to waive statutes that had not been raised in this litigation—sixteen statutes ranging from the Clean Water Act and the Safe Drinking Water Act, to the Noise Control Act and the Farmland Protection Policy Act. See note 3, *supra*. It appears that the Secretary decided simply to exempt the fence construction from any statute that might con-

ceivably apply, with no consideration of whether the waiver of each particular statute was "necessary."

But Congress did not authorize the Secretary to exempt from otherwise applicable law his actions or the actions of other agencies simply because it was "convenient" or "expedient"; it required a determination of "necessity." The Secretary's blunderbuss approach gives little indication that the Secretary acted in accordance with that congressional standard; rather, it provides considerable evidence that he did not.

Even with respect to NEPA's Environmental Impact Statement ("EIS") requirement, the Secretary's conclusion here that a waiver was "necessary" is suspect in light of his decision one month earlier—in September 2007—to prepare an EIS for construction of the border fence in an area approximately ***ten times larger*** than that covered by the waiver here. Letter from Michael Chertoff, Secretary of Homeland Security, to Sen. Joseph Lieberman, Chairman of the Sen. Comm. on Homeland Security and Governmental Affairs, 5-6 (Feb. 14, 2008). If the Executive Branch could satisfy NEPA's requirements there, why was a waiver with respect to the SPRNCA fence segment "necessary"? Review by this Court is essential to make clear that the Constitution requires judicial review to ensure that broad delegations to the Executive Branch such as the waiver authority here are exercised in accordance with the statutory limits established by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2008

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, *et al.*,

Plaintiffs,

v.

MICHAEL CHERTOFF,
Secretary Of Homeland Security, *et al.*,

Defendants.

Civil Action No. 07-1801 (ESH)

MEMORANDUM OPINION

Plaintiffs Defenders of Wildlife and the Sierra Club initially brought this lawsuit to challenge defendants' compliance with several environmental statutes with respect to the construction of physical barriers and roads along the U.S.-Mexico Border within the San Pedro Riparian National Conservation Area ("SPRNCA") in Arizona. Plaintiffs have now amended their complaint to allege that the Secretary of Homeland Security's waiver of numerous federal environmental laws under Section 102 of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 306, 8 U.S.C. § 1103 note, is unconstitutional. Because the Court finds that the waiver does not offend the principles of separation of powers or the nondelegation doctrine, it rejects plaintiffs' constitutional attack, and it will grant defendants' motion to dismiss.

BACKGROUND

At the direction of Congress, the Department of Homeland Security ("DHS") has undertaken to construct "physical barriers and roads" at various points

along the United States' border with Mexico in order "to deter illegal crossings in areas of high illegal entry into the United States." 8 U.S.C. § 1103 note. On or about September 29, 2007, the Army Corps of Engineers, on behalf of DHS, began constructing border fencing, an accompanying road and drainage structures within the SPRNCA, an area which plaintiffs describe as "a unique and invaluable environmental resource" and "one of the most biologically diverse areas of the United States."[1] Pls.' Mem. in Sup. of Mot. for Temporary Restraining Order ["TRO Mot."] at 1, 4-5.

The SPRNCA is managed by the Bureau of Land Management ("BLM"), which issued a perpetual right of way to DHS for the area of the fence project. (*Id.* at 1; Defs.' TRO Opp'n at 1, 3.) Before granting the right of way, BLM completed an Environmental Assessment ("EA"), which concluded that the proposed fencing would have no significant impact on the environment when paired with certain mitigation measures, and that an Environmental Impact Statement ("IS") was therefore not required by the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.* (*See* Ex. A to Defs.' TRO Opp'n at 3-4.)

After initially attempting to pursue administrative remedies within the BLM (see Pls.' TRO Mot. at 2), plaintiffs filed this action on October 5, 2007, and simultaneously moved for emergency injunctive re-

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[1] The challenged fence construction required excavation on up to 225 of the SPRNCA's 58,000 acres, and the proposed fence segments will cover approximately 9,938 feet at the border when completed. (Defs.' Opp'n to Pls.' Mot. for Temporary Restraining Order ["TRO Opp'n"] at 3; Ex. A to Defs.' TRO Opp'n [BLM's EA and Finding of No Significant Impact] at 12).

lief to halt the construction of the fence within the SPRNCA. In support of their motion, plaintiffs argued that BLM's EA was inadequate and that NEPA required the preparation of a full IS. (*See id.* at 8-18.) They also argued that the BLM's grant of the right-of-way violated the Arizona-Idaho Conservation Act of 1988, which directs the BLM to manage the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area" and to "only allow such uses of the conservation area" that further the purposes for which it was established. 16 U.S.C. § 460xx-1. After conducting a hearing on October 10, 2007, the Court granted plaintiffs' motion for a Temporary Restraining Order ("TRO"), finding that plaintiffs had demonstrated a substantial likelihood of success on the merits with respect to their NEPA claims and that the balance of the equities favored plaintiffs. In response to the Court's order, defendants halted construction of the fence within the SPRNCA.

Approximately two weeks later on October 26, 2007, DHS Secretary Michael Chertoff published a notice in the Federal Register waiving NEPA, the Arizona-Idaho Conservation Act, and eighteen other laws with respect to the construction of the SPRNCA fence under the authority granted to him by section 102 of the REAL ID Act of 2005.[2] *See* 72 Fed. Reg. 60,870 (Oct. 26, 2007); 8 U.S.C. § 1103 note. Section 102 of the REAL ID Act gives the Secretary of Home-

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[2] Section 102 of the REAL ID Act amended section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009- 546, 3009-554, and both are codified at 8 U.S.C. § 1103 note.

land Security "the authority to waive all legal requirements" that he determines "necessary to ensure expeditious construction" of border fences and roads "to deter illegal crossings in areas of high illegal entry." 8 U.S.C. § 1103 note. This provision also limits judicial review of claims arising from the Secretary's exercise of the waiver authority, and it allows the district courts to consider only those claims that allege a violation of the Constitution.[3]

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[3] The REAL ID Act's waiver provision states:

(c) Waiver.—

(1) In general.— Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) Federal court review.—

(A) In general.— The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

(B) Time for filing of complaint.— Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) Ability to seek appellate review.— An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

In his Federal Register notice, the Secretary stated that the area within the SPRNCA covered by this Court's TRO was "an area of high illegal entry," that "[t]here [wa]s presently a need to construct fixed and mobile barriers" in the area, and that it was therefore "necessary" for him to exercise the REAL ID Act's waiver authority "[i]n order to ensure the expeditious construction of the barriers and roads that Congress prescribed . . . ."[4] 72 Fed. Reg. 60,870. Upon notification of the Secretary's waiver, the Court va-

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REAL ID Act § 102(c), 8 U.S.C. § 1103 note.

[4] In addition to NEPA and the Arizona-Idaho Conservation Act, the Secretary also waived the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*; the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the Archeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.*; the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; the Noise Control Act, 42 U.S.C. § 4901 *et seq.*; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*; the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*; the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; the Archaeological and Historic Preservation Act, 16 U.S.C. § 469 *et seq.*; the Antiquities Act, 16 U.S.C. § 431 *et seq*; the Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 *et seq.*; the Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.*; the Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq.*; and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* The Secretary waived all of these laws "in their entirety, with respect to the construction of roads and fixed and mobile barriers . . . in the area starting approximately 4.75 miles west of the Naco, Arizona Port of Entry to the western boundary of the SPRNCA and any and all land covered by the TRO." 72 Fed. Reg. 60,870.

cated the TRO. *Defenders of Wildlife* v. *Chertoff*, Civ. No. 07-1801, Minute Order (Oct. 26, 2007). Plaintiffs subsequently amended their complaint to allege that the waiver provision of the REAL ID Act violates the separation of powers principles embodied in Articles I and II of the Constitution because it "impermissibly delegates legislative powers to the DHS Secretary, a politically-appointed Executive Branch official." (Am. Compl. ¶¶ 36-38.)

In response, defendants have moved to dismiss plaintiffs' amended complaint under Rules 12(b)(1) and (6). Defendants argue, based on the Supreme Court's "nondelegation" line of cases, that the REAL ID Act's waiver provision is a constitutionally permissible delegation of legislative power to the Executive Branch because it provides the Secretary with an "intelligible principle" that "clearly delineate[s] the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority" — i.e., that he may only waive the legal requirements that he "determines necessary to ensure expeditious construction of the barriers and roads." (Defs.' Renewed Mot. to Dismiss at 3-4 (quoting *Mistretta* v. *United States*, 488 U.S. 361, 372-73 (1989))), and 8 U.S.C. § 1103 note (internal quotation marks omitted)). In support of their argument, defendants also emphasize that "Congress may delegate in even broader terms" than otherwise permissible in matters of immigration policy, foreign affairs, and national security, because "the Executive Branch already maintains significant independent control" over these areas. (Defs.' Renewed Mot. to Dismiss at 4-5.)

ANALYSIS

The only issue presented is whether the Secretary's waiver under the REAL ID Act is constitutional. First and foremost, plaintiffs argue that the REAL ID Act's waiver provision is unconstitutional under *Clinton* v. *City of New York*, 524 U.S. 417 (1998), because it "provides the DHS Secretary with a roving commission to repeal, in his sole discretion, any law in all 50 titles of the United States Code that he concludes might impede construction of a border wall." (Pls.' Opp'n at 3-4 (emphasis omitted).) In *Clinton*, the Supreme Court struck down the Line Item Veto Act of 1996, which gave the President the authority to "cancel" certain federal spending items that had been passed by Congress, because the Court found that the Act — "[i]n both legal and practical effect" — allowed the President to amend Acts of Congress by repealing portions of them. *Clinton*, 524 U.S. at 438. Article I of the Constitution requires that all federal legislation pass both houses of Congress, and "before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." U.S. CONST. art. art. I, § 7. The cancellation procedures in the Line Item Veto Act, the Court held, were unconstitutional because "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton*, 524 U.S. at 438. "Amendment and repeal of statutes, no less than enactment, must conform with" the bicameralism and presentment requirements of Article I. *INS* v. *Chadha*, 462 U.S. 919, 954 (1983).

Plaintiffs argue that "[t]he power granted by section 102 of the REAL ID Act to the Secretary of DHS to 'waive' the applicability of any law that would otherwise apply to border wall and fence construction projects is unmistakably the power partially to repeal or amend such laws," and thus, that *Clinton* "squarely governs this case." (Pls.' Opp'n at 9-10.) The laws waived by the Secretary's federal register notice are "repeal[ed]," plaintiffs argue, "to the extent that they otherwise would have applied to wall and road construction" within the SPRNCA, and the waiver is therefore an "impermissible exercise of legislative authority." (Pls.' Surreply at 1, 2.)

Plaintiffs' arguments are unavailing, however, because the waiver provision of the REAL ID Act is not equivalent to the partial repeal or amendment at issue in *Clinton*. *See Sierra Club* v. *Ashcroft*, Civ. No. 04-272, 2005 U.S. Dist. LEXIS 44244, *21 (S.D. Cal. Dec. 12, 2005) (distinguishing the waiver of laws under the REAL ID Act from their "repeal"). It was "critical" to the *Clinton* Court's decision that the Line Item Veto Act essentially "g[a]ve[] the President the unilateral power to change the text of duly enacted statutes." *Clinton*, 524 U.S. at 446-47. The line items cancelled by the President would no longer have any "legal force or effect" under any circumstance. *Id.* at 437 (citing 2 U.S.C. §§ 691e(4)(B)-(C)). Similarly, in *Byrd* v. *Raines*, 956 F. Supp. 25, 37 (D.D.C. 1997) (vacated on other grounds), the predecessor case to *Clinton*, Judge Jackson of this Court reasoned that cancellation under the Line Item Veto Act "forever render[ed] a provision of federal law without legal force or effect, so the President who canceled an item and his successors must turn to Congress to reauthorize the foregone spending." *Id.* at 37. Judge Jackson also distinguished the Line Item Veto Act's

cancellation provision from the President's traditional authority to impound — or refrain from spending — funds appropriated by Congress, explaining: "Whereas delegated authority to impound is exercised from time to time, in light of changed circumstances or shifting executive (or legislative) priorities, cancellation occurs immediately and irreversibly . . . ." *Id.* at 36. He therefore held that the cancellation provision violated the Presentment Clause and constituted "a radical transfer of the legislative power to repeal statutory law." *Id.* at 33, 35 ("The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent.").

The REAL ID Act's waiver provision differs significantly from the Line Item Veto Act. The Secretary has no authority to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part. Each of the twenty laws waived by the Secretary on October 26, 2007, retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President. The fact that the laws no longer apply to the extent they otherwise would have with respect to the construction of border barriers and roads within the SPRNCA does not, as plaintiffs argue, transform the waiver into an unconstitutional "partial repeal" of those laws. By that logic, *any* waiver, no matter how limited in scope, would violate Article I because it would allow the Executive Branch to unilaterally "repeal" or nullify the law with respect to the limited purpose delineated by the waiver legislation. Yet, as plaintiffs acknowledge, there are myriad examples of

waiver provisions in federal statutes,[5] and they have not questioned Congress's ability to confer the waiver power in these circumstances. (*See* Pls.' Surreply at 6.) If the REAL ID Act's waiver provision is unconstitutional under *Clinton*, numerous other statutory authorizations of executive waivers would also be invalid. Such a conclusion is certainly not supportable under *Clinton* or any other case cited by plaintiffs.

Nor can plaintiffs gain any solace by citing *Clinton's* discussion of *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892), in which the Supreme Court upheld the constitutionality of a suspension provision in the Tariff Act of 1890. (*See* Pls.' Opp'n at 24.) The Tariff Act exempted certain import commodities from tariffs, but directed the President to "suspend" the exemption with respect to any country that he found imposed "reciprocally unequal and unreasonable" duties on American exports. *Field*, 143 U.S. at 680.

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[5] *See, e.g.*, 10 U.S.C. § 433 (Secretary of Defense, "in connection with a commercial activity," may waive compliance with "certain Federal laws or regulations pertaining to the management and administration of Federal agencies" if they would "create an unacceptable risk of compromise of an authorized intelligence activity."); 15 U.S.C. § 2621 (EPA may waive compliance with Toxic Substances Act "upon a request and determination by the President that the requested waiver is necessary in the interest of national defense."); 20 U.S.C. § 7426(e) (Secretaries of the Interior, Labor, Health and Human Services, and Education "[n]otwithstanding any other provision of law . . . shall have the authority to waive any regulation, policy, or procedure promulgated by [their] department" necessary for the integration of education and related services provided to Indian students.); 22 U.S.C. § 7207(a)(3) (President may waive a statutory prohibition on assistance to certain countries "to the degree [he] determines that it is in the national security interest of the United States to do so, or for humanitarian reasons.").

Clinton distinguished the Tariff Act from the Line Item Veto Act, identifying "three critical differences" between the two,[6] and plaintiffs argue that these differences demonstrate that the REAL ID Act's waiver provision must be invalidated under *Clinton*. *Clinton*, 524 U.S. at 443-44. (*See* Pls.' Opp'n at 25.)

However, in distinguishing *Field*, the *Clinton* Court did not purport to adopt a three-part test based on these distinctions to determine whether a particular waiver provision is constitutional. Rather, the deciding factor for the *Clinton* Court was that the cancellations under the Line Item Veto Act were the "functional equivalent of repeals of Acts of Congress," while the suspensions under the Tariff Act were "not exercises of legislative power." *Clinton*, 524 U.S. at 444. In particular, the Court noted that the Line Item Veto Act authorized the President "to effect the repeal of laws[] for his own policy reasons," thereby "rejecting the policy judgment made by Congress and relying on his own policy judgment." *Id* at 444, 45. By contrast, when the DHS Secretary exercises his waiver authority under the REAL ID Act, he is acting as Congress has expressly directed — *i.e.*, to "expeditious[ly]" construct "physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry . . . ." 8 U.S.C. § 1103 note. And more importantly, the *Clinton* Court distinguished the Tariff Act

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[6] Specifically, the Court found that in the Tariff Act, but not in the Line Item Veto Act, (1) "the exercise of the suspension power was contingent upon a condition that did not exist" when the statute was passed; (2) there was a duty to suspend or waive once a defined contingency had arisen; and (3) whenever the President suspended an exemption, he was executing the express congressional policy embodied in the statute. *Clinton*, 524 U.S. at 443-44

from the Line Item Veto Act on the ground that it related to "the foreign affairs arena," a realm in which the President has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.* at 445 (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)) (internal quotation marks omitted); *see also Field*, 143 U.S. at 691 ("[I]n the judgment of the legislative branch of government, it is often desirable, if not essential for the protection of the interests of our people . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.") The REAL ID Act's waiver provision, like the Tariff Act, relates to foreign affairs and immigration control — another area in which the Executive Branch has traditionally exercised a large degree of discretion. For these reasons, the *Clinton* Court's discussion of *Field* does not support plaintiffs' arguments.

In sum, the waiver provision at issue here is not equivalent to the power to amend or repeal duly enacted laws, and therefore the holding of *Clinton* is inapplicable. This conclusion finds additional support in Judge (now Chief Justice) Roberts' concurring opinion in *Acree* v. *Republic of Iraq*, 370 F.3d 41, 64 n.3 (D.C. Cir. 2004), where he was addressing the validity of a waiver provision contained in the Emergency Wartime Supplemental Appropriations Act ("EWSAA"). Section 1503 of the EWSAA authorizes the President to "make inapplicable to Iraq Section 620A of the Foreign Assistance Act of 1961 and '*any* other provision of law that applies to countries that have supported terrorism.'" *Id.* at 60 (Roberts, J., concurring) (emphasis added by Judge Roberts). Judge Roberts summarily dismissed in a footnote

plaintiffs' argument that "the grant of such authority to the President is unconstitutional in light of [*Clinton*] because such a grant would empower the President to . . . 'repeal [a statute] solely as it relates to Iraq.'" *Id.* at 64 n.3 (quoting appellees' brief). Rather, he found that "[t]he actions authorized by the EWSAA are a far cry from the line-item veto at issue in *Clinton*, and are instead akin to the waivers that the President is routinely empowered to make in other areas, particularly in the realm of foreign affairs." *Id*; *see also Jacobsen* v. *Oliver*, 451 F. Supp. 2d 181, 193 (D.D.C. 2006) (citing *Acree*, 370 F.3d at 64 n. 3).

Plaintiffs also argue more generally that the waiver authority violates fundamental separation of powers principles because it is an unconstitutional delegation of legislative power to the Executive Branch. "[T]he fundamental constitutional role of the Executive Branch under Article II," plaintiffs argue, "is to 'faithfully execute' — not selectively void — the laws. The Secretary's attempt to repeal unilaterally nineteen laws that otherwise would have constrained his conduct, and the law that purports to authorize him in taking such improper action, thus squarely offend both Article I and Article II." (Pls.' Opp'n at 2.) But "the Supreme Court has widely permitted the Congress to delegate its legislative authority to the other branches," so long as the delegation is accompanied by sufficient guidance. *Smith* v. *Fed. Reserve Bank of N.Y.*, 280 F. Supp. 2d 314, 324 (S.D.N.Y. 2003) (upholding EWSAA's waiver provision against a nondelegation challenge) (citing *Loving* v. *United States*, 517 U.S. 748, 771 (1996) ("Though in 1935 we struck down two delegations for lack of an intelligible principle, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), we have

since upheld, without exception, delegations under standards phrased in sweeping terms."), and *Mistretta*, 488 U.S. at 373 ("After invalidating in 1935 two statutes as excessive delegations, we have upheld, again without deviation, Congress' ability to delegate power under broad standards." (citations omitted))). A delegation of legislative power to the Executive Branch is permissible under Supreme Court precedent where Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform . . . ." *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)) (second alteration in original) (internal quotation marks omitted).

In order to exercise the waiver authority under the REAL ID Act, Congress has required the Secretary to determine if the waiver is "necessary to ensure expeditious construction of the barriers and roads under [section 102 of IIRIRA]." 8 U.S.C. § 1103 note. Furthermore, he is directed to construct fencing only "in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." *Id.* This legislative directive meets the requirements of the Supreme Court's nondelegation cases. The "general policy" is "clearly delineated" — *i.e.* to expeditiously "install additional physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry." *Mistretta*, 488 U.S. at 372-73; 8 U.S.C. § 1103 note. And, the "boundaries" of the delegated authority are clearly defined by Congress's requirement that the Secretary may waive only those laws that he determines "necessary to ensure expeditious construction." *Mistretta*, 488 U.S. at 372-73; 8 U.S.C. § 1103 note.

The Supreme Court upheld a similar standard in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), its most recent opinion to address the nondelegation doctrine. The *Whitman* Court rejected a nondelegation challenge to a provision of the Clean Air Act that directed the Environmental Protection Agency to set air quality standards at a level "requisite to protect public health." *Id.* at 465 (citing 42 U.S.C. § 7409(b)(1)). The "scope of discretion" allowed by such a standard, which the Court interpreted to mean "not lower or higher than is necessary," was "well within the outer limits of [the Supreme Court's] nondelegation precedents." *Id.* at 474, 76 (noting that the Clean Air Act's standard was also "strikingly similar" to the standard approved in *Touby* v. *United States*, 500 U.S. 160, 163 (1991), which permitted the Attorney General to designate a drug as a controlled substance if doing so was "necessary to avoid an imminent hazard to the public safety."). The Court confirmed that its nondelegation precedent has never required Congress to define, for example, "how 'necessary' was necessary enough." *Id.* at 475.

Given this precedent, this Court cannot agree that the REAL ID Act's waiver provision constitutes an impermissibly standardless delegation. This conclusion is also in accord with the only other decision to address the question of whether the REAL ID Act's waiver provision is a constitutional delegation. In that case, the district court upheld the waiver provision, finding that "[a]pplying a standard of 'necessity' to Congress' delegation of authority passes constitutional muster."[7] *Sierra Club*, 2005 U.S. Dist.

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[7] As plaintiffs point out, the *Sierra Club* court mistakenly believed that the REAL ID Act's waiver provision applies only to the construction of a specific section of fencing near San Diego.

LEXIS 44244 at *21 ("The Court finds Congress provided an adequate standard [within the REAL ID Act] for the exercise of the DHS Secretary's delegated waiver authority over laws impeding the completion of the [border fence]: 'necessity,' *i.e.*, when needed 'to ensure expeditious construction of the barriers and roads under this section.'").

Finally, plaintiffs argue that while there are numerous examples in federal laws of provisions that allow the Executive Branch to waive various legal requirements in certain circumstances, "[t]he scope of the REAL ID Act's waiver provision . . . is unprecedented in our history." (Pls.' Opp'n at 3.) Plaintiffs rely on the fact that the REAL ID Act waiver permits the Secretary to waive any law with respect to the construction of the border fences and roads. (*See* Pls.' Opp'n at 22 ("The sweeping power to void existing law given to the Secretary by section 102 differs in fundamental ways from prior legally-valid Congressional waivers.").) Previous statutory waivers, plaintiffs contend, have often "involved Congress itself directly waiving particular laws, or instructing the President or another officer to waive particular provisions (usually provisions of the same law containing the waiver) if certain circumstances occur." (*Id.* at 3.) Plaintiffs also argue that many of the waiver provisions cited by the government permit the Executive Branch to waive only legal requirements contained within the same statute. (Pls.' Sur-

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See Sierra Club, 2005 U.S. Dist. LEXIS 44244, *21. But the court's reasoning was not dependent on the belief that the geographic scope of the waiver authority was so limited. Rather, the court upheld the waiver because the "necessity" standard provided an adequate intelligible principle to circumscribe the actions the Secretary was permitted to take. *Id.* at *20-21.

reply at 3.) Indeed, a memorandum produced by the Congressional Research Service notes that the REAL ID Act's waiver provision appears to be unprecedented in that it "contains 'notwithstanding language,' provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws." (Pls.' Ex. 2 at 2-3). But even if, as argued by plaintiffs, this waiver provision is unique insofar as the number of laws that may be waived is theoretically unlimited, the Secretary may only exercise the waiver authority for the "narrow purpose" prescribed by Congress: "expeditious completion" of the border fences authorized by IIRIRA in areas of high illegal entry. *Sierra Club*, 2005 U.S. Dist. LEXIS 44244, at *20. Thus, the scope of the Secretary's discretion is expressly limited.

More importantly, despite the surface appeal of plaintiffs' arguments, they cannot survive careful scrutiny, for there is no legal authority or principled basis upon which a court may strike down an otherwise permissible delegation simply because of its broad scope. *See Loving*, 517 U.S. at 771 ("[W]e have since [1935] upheld, without exception, delegations under standards phrased in sweeping terms.") This lack of authority is hardly surprising, since to provide a constitutionally permissible "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-73 (quoting *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). Moreover, as cautioned by this Circuit, "[o]nly the most extravagant delegations of authority, those providing *no* standards to constrain administrative discretion, have been condemned by the Supreme Court as un-

constitutional." *Humphrey* v. *Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988) (emphasis added); *see also Yakus* v. *United States*, 321 U.S. 414, 426 (1944) ("Only if we could say that there is an *absence* of standards for the guidance of the Administrator's action . . . would we be justified in overriding [Congress's] choice of means for effecting its declared purpose . . . ." (emphasis added)); *Milk Indus. Found.* v. *Glickman*, 949 F. Supp. 882, 890 (D.D.C. 1996) (use of the nondelegation doctrine to overturn legislation should only be used in the "extremist instance") (quoting *Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO* v. *Connally*, 337 F. Supp. at 737, 762 (D.D.C. 1971)).

Applying these precedents, the Court concludes that it lacks the power to invalidate the waiver provision merely because of the unlimited number of statutes that could potentially be encompassed by the Secretary's exercise of his waiver power. Rather, under the nondelegation doctrine, the relevant inquiry is whether the Legislative Branch has laid down an intelligible principle to guide the Executive Branch, not the scope of the waiver power. Therefore, based on controlling Supreme Court precedent, the Court finds that the REAL ID Act's waiver provision is a valid delegation of authority.

This conclusion is further buttressed by the well-established principle that was decisive in the *Clinton* case, 524 U.S. at 445 — "[w]hen the area to which the legislation pertains is one where the Executive Branch already has significant independent constitutional authority, delegations may be broader than in other contexts." *Sierra Club*, 2005 U.S. Dist. LEXIS 44244 at *17 (citing *Loving*, 517 U.S. at 772). The construction of the border fence pertains to both foreign affairs and immigration control — areas over

which the Executive Branch traditionally exercises independent constitutional authority. Thus, with respect to border control measures such as those at issue here, the Executive has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Clinton*, 524 U.S. at 445 (quoting *Curtiss-Wright Export Corp.*, 299 U.S. at 320) (internal quotation marks omitted). When Congress legislates regarding foreign affairs or immigration control, "it is not dealing alone with a legislative power. It is implementing an inherent executive power." *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Because these powers are "also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise [them]. . . ." *Id.* at 543.

In sum, given the Supreme Court's ready acceptance of the "necessity" standard as an adequate "intelligible principle" to guide a delegation of legislative authority to the Executive Branch, as well as the Executive's independent constitutional authority in the areas of foreign affairs and immigration control, the Court is constrained to reject plaintiffs' claim that the waiver provision of the REAL ID Act is an unconstitutional delegation.

CONCLUSION

Because the Court holds that the Secretary's waiver is constitutional, and because it has no jurisdiction to decide plaintiffs' statutory claims, defendants' renewed motion to dismiss [Dkt. # 17] is **GRANTED**, and the case is dismissed with prejudice. A separate order accompanies this Memorandum Opinion.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: December 18, 2007

No. 07-1180

In the Supreme Court of the United States

DEFENDERS OF WILDLIFE, ET AL., PETITIONERS

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Congress has directed the installation of physical barriers and roads to prevent illegal crossing of the Nation's border and has provided that, "[n]otwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads." Section 102(c)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-554, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 102, 119 Stat. 306. The questions presented are:

1. Whether this waiver provision constitutes an unconstitutional delegation of legislative power to the Executive because only limited judicial review is permitted.

2. Whether the Secretary's exercise of the waiver effected an unconstitutional repeal of federal laws in violation of Article I, Section 7 of the Constitution.

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In the Supreme Court of the United States

No. 07-1180

DEFENDERS OF WILDLIFE, ET AL., PETITIONERS

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. 1a-20a) is reported at 527 F. Supp. 2d 119.

JURISDICTION

The judgment of the district court was entered on December 18, 2007. The petition for a writ of certiorari was filed on March 17, 2008. The jurisdiction of this Court is invoked under Section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 306.

STATUTORY PROVISION INVOLVED

Section 102(a)-(c) of IIRIRA, as amended in 2005 and 2006, is reprinted at App., *infra*, 1a-4a.

STATEMENT

1. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought, among other things, to improve security at the Nation's borders in order to halt illegal immigration. Section 101 of IIRIRA increased the number of border patrol agents and their supporting personnel. See 110 Stat. 3009-553. Section 102 of IIRIRA specifically addressed physical barriers at the Nation's borders. Section 102(a) required the Attorney General to improve barriers at the border, and specifically required her to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a), 110 Stat. 3009-554. Section 102(c) provided that the provisions of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, "are waived to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section." 110 Stat. 3009-555.

When it created the Department of Homeland Security (DHS), Congress transferred the Attorney General's powers and duties to "control and guard the boundaries and borders of the United States against the illegal entry of aliens" to the Secretary of Homeland Security (Secretary). 8 U.S.C. 1103(a)(1) and (5) (2000 & Supp. V 2005); see also 6 U.S.C. 251 and 291 (Supp. V 2005).

In 2005, Congress amended several federal laws with the declared purpose of "protect[ing] against terrorist

entry." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, 119 Stat. 302. One of those amendments expanded the scope of Section 102(c) of IIRIRA, which had authorized the waiver of two federal environmental statutes if necessary to ensure expeditious construction of barriers and roads at the border. That waiver provision now reads as follows:

> Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1), as amended, 119 Stat. 306.

Congress also provided for limited and streamlined judicial review of such waivers. A federal district court may hear a claim arising from the Secretary's exercise of the waiver authority, but only if the claim "alleg[es] a violation of the Constitution of the United States"; the claim must be brought within 60 days after the waiver; and any district court decision is reviewable only through a writ of certiorari from this Court. IIRIRA § 102(c)(2)(A)-(C), as amended, 119 Stat. 306.

In the Secure Fence Act of 2006, Congress imposed additional obligations on the Secretary with regard to border security. Among other things, it gave the Secretary 18 months to take "all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States," through both border surveillance and "physical infra-

structure enhancements." Pub. L. No. 109-367, § 2(a), 120 Stat. 2638. Congress defined "operational control" as "the prevention of *all unlawful entries* into the United States." § 2(b), 120 Stat. 2638 (emphasis added).[1]

2. The Bureau of Land Management (BLM) manages the San Pedro Riparian National Conservation Area (SPRNCA), which comprises approximately 58,000 acres in Arizona, near the San Pedro River. Pet. App. 1a-2a. In fall 2007, acting pursuant to NEPA, BLM completed an environmental assessment, concluding that proposed border fencing in the SPRNCA would not have a significant impact on the environment. *Id.* at 2a. BLM granted a right of way to DHS for the construction of a section of border fencing within the SPRNCA, and the Army Corps of Engineers, acting on behalf of DHS, began constructing fences, an accompanying road, and drainage structures along the United States border with Mexico within the SPRNCA. The relevant portion of the fence runs along just under 10,000 feet of the border. *Id.* at 2a n.1.

3. a. On October 5, 2007, petitioners filed this case, seeking an injunction barring construction of the SPRNCA fence based on alleged violations of NEPA, the Arizona-Idaho Conservation Act of 1988 (AICA), 16 U.S.C. 460xx *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See Pet. App. 2a-3a. At a hearing five days later, the district court granted a temporary restraining order, finding that petitioners had demonstrated a likelihood of success with respect to their NEPA claims. *Id.* at 3a. In response to the court's order, the construction of, and activities related to the

[1] Section 3 of the Secure Fence Act amended Section 102(b) of IIRIRA by expanding the number of places where Congress expressly directed that the Secretary erect border fencing. 120 Stat. 2638-2639.

construction of, all border walls, fences, and roads within the SPRNCA were halted. *Ibid.*

b. With construction thus halted by petitioners' lawsuit—and with an average of 52 aliens illegally coming across the border within the SPRNCA every day—the Secretary exercised his waiver authority under Section 102(c) of IIRIRA.[2] On October 26, 2007, he published in the *Federal Register* his decision to waive, with respect to the construction of the SPRNCA fence, the three statutes that formed the basis for petitioners' lawsuit (NEPA, the AICA, and the APA) and 17 other specific federal statutes that can restrict land uses. 72 Fed. Reg. 60,870; see also Pet. App. 5a n.4 (listing waived statutes). In that decision, the Secretary set forth his determinations that the relevant area is an area of high illegal entry, that there is a need to construct fixed and mobile barriers and roads in the vicinity of the border, and that the waiver was "necessary" to "ensure the expeditious construction of the barriers and roads that Congress prescribed * * * in the area starting approximately 4.75 miles west of the Naco, Arizona Port of Entry to the western boundary of the SPRNCA and any and all land covered by the TRO [in this case]." 72 Fed. Reg. at 60,870.

Upon being notified of the publication of the Secretary's waiver decision, the district court vacated its temporary restraining order on October 26, 2007. Pet. App. 5a-6a.

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[2] As counsel for the government explained at the TRO hearing, there were 19,000 apprehensions of illegal entrants in the SPRNCA in fiscal year 2007, which, at an average of 52 persons a day, meant that a 20-day delay in construction to allow for the briefing of a preliminary injunction would permit at least 1,040 additional illegal entrants into the country. 10/10/2007 Tr. 85.

4. The government then moved to dismiss this action in district court, contending that the Secretary's waiver had rendered the statutes giving rise to the action inapplicable and thus divested the district court of jurisdiction. Petitioners responded by asserting that the statutory waiver provision was an unconstitutional Executive repeal of duly enacted statutes and an unconstitutional delegation of legislative authority to the Secretary. The district court granted the government's motion to dismiss. Pet. App. 1a-20a.

a. The district court first held that, contrary to petitioners' assertions, the waiver provision "is not equivalent to the partial repeal or amendment at issue in *Clinton* [v. *City of New York*, 524 U.S. 417 (1998)]." Pet. App. 8a. It explained that, in *Clinton*, the line items cancelled by the President under the Line Item Veto Act of 1996, 2 U.S.C. 691 *et seq.*, would not have had any legal force or effect under any circumstance, but that a waiver under Section 102(c) of IIRIRA does not similarly invalidate any law or statutory provision. Instead, the waiver in this case simply makes the specified provisions inapplicable to a particular border-barrier project. Pet. App. 8a-9a. The district court noted that there are "myriad examples" in which Executive Branch officials may waive specific applications of laws, and that petitioners did not argue that such waiver provisions are all unconstitutional. *Id.* at 9a-10a. The court also noted that the waiver provision here implements Congress's directive that border barriers be constructed expeditiously, while the line-item veto at issue in *Clinton* involved the Executive's specific rejection of Congress's own policy judgments and the implementation of contrary Executive policies in their place. *Id.* at 11a. Finally, it noted that the waiver here, unlike the line-item

veto, involves "foreign affairs and immigration control" —areas over which the Executive has traditionally exercised a large degree of discretion. *Id.* at 12a.

b. The district court also rejected petitioners' argument that the statutory waiver authorization is an unconstitutional delegation of legislative authority. Pet. App. 13a-19a. The district court followed this Court's precedents holding that the Constitution permits Congress to grant authority to the Executive so long as "Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Id.* at 14a (quoting *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989)). The court held that the waiver authority here satisfies that intelligible-principle requirement because Section 102(c) clearly delineates the general policy the Secretary must implement (the expeditious installation of border barriers) and clearly defines the limits of that authority by allowing waiver only when "necessary to ensure expeditious construction." *Ibid.* The court rejected petitioners' contention that the waiver provision is unconstitutionally broad because it allows for waiver of all legal requirements to the extent necessary to ensure expeditious construction, rather than just specifically designated laws. *Id.* at 16a-18a. Similarly, the court noted that broader grants of authority are permissible in areas where the Executive already has significant independent constitutional authority, such as immigration and foreign affairs. *Id.* at 18a-19a.

c. After their suit was dismissed, petitioners filed no request for any form of stay or injunctive relief, and, as

petitioners note (Pet. 11 n.4), construction of the barriers has since been completed.[3]

[3] Petitioners assert (Pet. 11 n.4) that the case has not become moot because, if the Secretary's waiver is invalidated, they could still "seek effective remedies" under "NEPA and other laws" to "mitigate or avoid the harms threatened by the fence." They cite no authority for that assertion, and it is not clear what relief they could properly receive—especially under NEPA, which is a purely procedural statute that does not mandate any substantive outcome in agency decisionmaking, see *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), but instead governs matters to be considered in connection with a proposed action. Once the proposed action has been approved and the on-the-ground activity completed, there is no remaining federal action to which any further NEPA obligation could attach. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 72-73 (2004); see also *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 371-374 (1989) (explaining that NEPA may require the preparation of a supplemental environmental impact statement only so long as "there remains major Federal action to occur") (internal quotation marks and alteration omitted); *One Thousand Friends* v. *Mineta*, 364 F.3d 890, 893 (8th Cir. 2004) (holding NEPA challenge to a completed project moot because NEPA's purpose is to "ensur[e] that the review process is followed correctly by federal agencies, not to second-guess design decisions"); *Richland Park Homeowners Ass'n* v. *Pierce*, 671 F.2d 935, 941 (5th Cir. 1982) (explaining that NEPA is not intended to "serve as a basis for after-the-fact critical evaluation subsequent to substantial completion of the construction"); but cf. *Oregon Natural Res. Council* v. *United States BLM*, 470 F.3d 818, 821-822 (9th Cir. 2006) (holding that some "effective relief" remained under NEPA challenge to timber-harvesting project because certain post-harvest activities remained to be completed).

Petitioners have also raised claims under the AICA, which, in contrast to NEPA, does impose substantive obligations on the Secretary of the Interior to "manage" the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the * * * resources of the conservation area" and to "allow" only those uses of the conservation area that "further the primary purposes" for which it was established. 16 U.S.C. 460xx-1(a) and (b). Thus, there may be some possibility of future relief if the Secretary's waiver were invalidated and peti-

ARGUMENT

The decision of the district court is correct and does not conflict with any decision of this Court or any other court. This Court's review is therefore not warranted.

1. a. As an initial matter, there is no split of authority with respect to the Secretary's exercise of waiver authority under Section 102(c) of IIRIRA. Three courts (including the district court in this case) have addressed constitutional challenges to the waiver provision, and all three have upheld the provision's constitutionality. See Pet. App. 1a-20a; *Save Our Heritage* v. *Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Sierra Club* v. *Ashcroft*, No. 04CV0272-LAB, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005).[4] That unanimity is unsurprising in light of this Court's prior decisions, which, as discussed below, establish that the waiver is not an unconstitutional delegation of legislative power.

Petitioners contend that the decision below conflicts with court of appeals decisions "holding that the availability of judicial review is essential to satisfy the 'intelligible principle' standard." Pet. 3; accord Pet. 10. But this Court vacated the only decisions petitioners cite that invalidated statutory provisions on unconstitutional delegation grounds because of the unavailability of judicial review. See Pet. 15-16 (citing *South Dakota* v. *Department of the Interior*, 69 F.3d 878, 881 (8th Cir. 1995), vacated, 519 U.S. 919 (1996); *United States* v.

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tioners' AICA claim were ultimately held to be meritorious. That possibility appears to prevent petitioners' constitutional claim—the only one at issue in this Court—from being moot at this point.

[4] There are of course no court of appeals decisions on point because district court decisions concerning the constitutionality of a Section 102(c) waiver are reviewable only by this Court. IIRIRA § 102(c)(2)(C), as amended, 119 Stat. 306.

Widdowson, 916 F.2d 587, 591 (10th Cir. 1990), vacated, 502 U.S. 801 (1991)). Other decisions merely suggest that the existence of judicial review is a factor to be considered in determining whether an unconstitutional delegation of legislative power has taken place. *E.g.*, *United States* v. *Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994). And in the most relevant decision, the Ninth Circuit specifically rejected the argument that "a delegation of legislative power that is statutorily exempt from judicial review violate[s] the nondelegation doctrine." *United States* v. *Bozarov*, 974 F.2d 1037, 1041-1045 (1992), cert. denied, 507 U.S. 917 (1993).

b. Petitioners assert (Pet. 25) that this Court's review is somehow "[n]ecessitate[d]" by Congress's decision to shorten the process of judicial review of Section 102(c) waivers. To the contrary, the unusual—but not unique, see 43 U.S.C. 1652(d)—decision by Congress to bypass the courts of appeals and yet to provide for this Court's review only via certiorari rather than appeal as of right strongly reinforces what is in any event obvious from the terms of Section 102 as a whole: Congress wanted "expeditious construction" of border barriers in "areas of high illegal entry" to take priority over the normal operation of other federal statutes and the long delays often associated with litigation. IIRIRA § 102(a), 110 Stat. 3009-554; § 102(c)(1), as amended, 119 Stat. 306; see also § 102(c)(2)(B), as amended, 119 Stat. 306 (requiring waivers to be challenged within 60 days). The special statutory framework therefore weighs heavily against discretionary review of a district court decision sustaining the constitutionality of a waiver, at least in the absence of extraordinary circumstances that are wholly lacking here.

Given the absence of any conflict about the constitutionality of Section 102(c) of IIRIRA, the completion of the segment of border fence at issue, and Congress's concern for speedy termination of such disputes, this case falls short of having any special claim to this Court's discretionary certiorari jurisdiction. Indeed, a grant of certiorari in this case, at a time when the Secretary is under a statutory obligation to achieve operational control over the Nation's borders within a matter of months, see pp. 3-4, *supra*, would be far more likely to "create[] uncertainty" (Pet. 28) about the use of the waiver authority than has the current unanimity among lower courts.[5]

2. a. The district court's decision with respect to the nondelegation doctrine follows the firmly established precedent of this Court. The Constitution permits Congress to grant decisionmaking authority to Executive Branch officials as long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928); accord, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Loving* v. *United States*, 517 U.S. 748, 771

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[5] Petitioners also make a glancing reference (Pet. 16-17) to federalism concerns, but their lawsuit, which arose exclusively under three federal statutes, is obviously an inappropriate vehicle for evaluating the effects of the Secretary's waiver on state and local laws. The waiver at issue in this case also fails to present anything remotely resembling the parade of horribles conjured by the amici law professors. See Araiza Amicus Br. 11 (suggesting that the Secretary might, in the future, waive laws not tied to land use, such as federal labor and workplace safety laws, or state speed limits). To date, the waivers issued by the Secretary have focused on statutes that have implications for land use. See 73 Fed. Reg. 19,080 (2008); *id.* at 19,077-19,078; 72 Fed. Reg. 60,870 (2007); *id.* at 2535-2536; 70 Fed. Reg. 55,623 (2005).

(1996); *Touby* v. *United States*, 500 U.S. 160, 165 (1991); *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). As this Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle." *Whitman*, 531 U.S. at 474 (referring to *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935)); *Loving*, 517 U.S. at 771 (same); *Mistretta*, 488 U.S. at 373 (same); see also *id.* at 416 (Scalia, J., dissenting) (explaining that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

To provide a constitutionally sufficient "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). The waiver provision in Section 102(c) of IIRIRA readily meets that test. Congress has clearly delineated the general policy, namely "to ensure expeditious construction of the barriers and roads under this section," IIRIRA § 102(c)(1), as amended, 119 Stat. 306, which are, by definition, "in the vicinity of the United States border," and are erected "to deter illegal crossings in areas of high illegal entry into the United States," § 102(a), 110 Stat. 3009-554. Congress has clearly identified the Secretary as the public agency who is to apply the standard. And Congress has established the boundaries of the delegated authority by permitting a waiver only for construction along the border and only when "necessary to ensure expeditious construction of the barriers and roads under" Section 102. § 102(c)(1), as amended, 119 Stat. 306.

These limitations are more than adequate to provide the constitutionally requisite guide for the Secretary's actions, and, indeed, provide considerably more focused direction than other limitations that this Court has sustained against nondelegation challenges.[6]

b. Although there can be little doubt that Section 102(c) satisfies the usual test, "the same limitations on delegation" do not even apply in a case like this, in which "'the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Loving*, 517 U.S. at 772 (quoting *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975)). Here, the Executive Branch possesses independent authority over

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[6] See, *e.g.*, *Whitman*, 531 U.S. at 472 (upholding authorization for EPA to set air quality standards "the attainment and maintenance of which in the judgment of the Administrator * * * are requisite to protect the public health") (quoting 42 U.S.C. 7409(b)(1)); *Touby*, 500 U.S. at 163 (upholding grant to the Attorney General of authority to amend the threshold for criminal liability by adding a drug temporarily to the statutory list of controlled substances if "necessary to avoid an imminent hazard to the public safety") (quoting 21 U.S.C. 811(h)); *American Power & Light*, 329 U.S. at 104 (upholding grant to SEC of authority to modify the structure of holding company systems to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders") (quoting § 11(b)(2) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(2)); *Yakus* v. *United States*, 321 U.S. 414, 420 (1944) (upholding grant to Executive of authority to fix maximum commodity prices that "will be generally fair and equitable and will effectuate the purposes of this Act") (quoting § 2(a) of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 24 (repealed 1966)); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (upholding exercise of authority based on a "public interest" standard); see also *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld * * * a 'public interest' standard?").

the subject matters related to border barriers, namely immigration and foreign relations. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (citations omitted); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950) ("The right to [exclude aliens] * * * is inherent in the executive power to control the foreign affairs of the nation."). Those considerations are, of course, at their zenith with respect to security at the very borders of the Nation.

Thus, it is not surprising that petitioners do not argue that the statutory waiver provision fails, per se, to provide a sufficiently intelligible principle.

3. Petitioners instead assert that the intelligible-principle test should include an additional element; they contend that Congress cannot confer decisionmaking authority on the Executive unless it provides both an intelligible principle *and* judicial review of the Executive's compliance with the statutory standard. See Pet. 3 (arguing that "[t]he absence of judicial review here is * * * fatal * * * under the nondelegation doctrine"); Pet. 19 ("judicial review is an essential element of [the intelligible-principle] standard"). That assertion is contrary to this Court's previous decisions, and, with the exception of decisions vacated by this Court (see pp. 9-10, *supra*), petitioners cite no decision by any court holding that judicial review for statutory compliance is invariably necessary for a conferral of authority on the Executive Branch to be constitutional.

Indeed, petitioners' position on this issue has evolved during this litigation. Before the district court, petition-

ers asserted that the statutory limitation on judicial review merely helped illustrate why (in their view) the waiver provision fails to provide sufficient restraints on the Secretary's exercise of authority to satisfy the "intelligible principle" standard. Pet. D. Ct. Opp. to Resp. Renewed Mot. to Dismiss 31. Before this Court, however, petitioners and the amici supporting them take a new, more absolute, position that was neither pressed nor passed upon in the court below, namely that "a delegation of authority can satisfy the 'intelligible principle' standard *only* if the Executive's actions are subject to judicial review." Pet. 3 (emphasis added); see also Fourteen Members of the House of Reps. Amicus Br. 23; Araiza Amicus Br. 12-19.

A similar argument was raised in *Touby*, but the majority of the Court—unlike the opinion of Justice Marshall quoted by petitioners and the amici law professors, Pet. 14; Araiza Amicus Br. 13—did not announce any such rule, concluding instead that it was sufficient that the statutory scheme at issue there, which imposed criminal sanctions for a violation, allowed a criminal defendant to challenge the administrative decision while defending himself against a prosecution. See *Touby*, 500 U.S. at 168-169. Even Justice Marshall's explanation of the need for judicial review in *Touby* depended on the fact that the administrative standard in question was enforceable "by criminal law"—implicating a species of personal rights that is not relevant in this case—and cited a passage in *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988), that preserved judicial review in a non-criminal context only for constitutional claims. See 500 U.S. at 170 (Marshall, J., concurring).

a. Petitioner's theory is not supported by the constitutional underpinnings of the nondelegation doctrine.

The doctrine derives from the vesting of specific "legislative Powers" in Congress. See U.S. Const. Art. I, § 1. Accordingly, "the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman*, 531 U.S. at 472; accord *Loving*, 517 U.S. at 771 (explaining that the doctrine derives from "the understanding that Congress may not delegate the power to make laws"). The judiciary's role (if any) is separate from the answer to that question. Whether or not a given power is "legislative" or constitutes "the power to make laws" under our Constitution has nothing to do with whether the exercise of that power is subject to judicial (or any other) review.

b. Petitioners' legal argument also cannot be reconciled with this Court's application of the intelligible-principle test as a one-step inquiry. In cases specifically addressing nondelegation arguments, it has been clear that the only constitutional requirement is that Congress *provide* an intelligible principle for the Executive. Indeed, that has been true since the Court first announced the test in the following terms: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton*, 276 U.S. at 409. According to the plain terms of that test, the only constitutional requirements are that Congress "lay down" the "intelligible principle" and "direct[]" the agency to conform to it, *not* that Congress also provide for judicial review as a mechanism by which compliance will be enforced. More recent decisions have repeated that clear formulation of the test, which stresses the establishment of a standard for the Executive to apply, without mentioning judicial application.

See, *e.g.*, *Touby*, 500 U.S. at 165 (quoting *J.W. Hampton*, 276 U.S. at 409); *Mistretta*, 488 U.S. at 372 (same); *Federal Energy Admin.* v. *Algonquin, SNG, Inc.*, 426 U.S. 548, 559 (1976) (same); *Lichter* v. *United States*, 334 U.S. 742, 785 (1948) (same); see also *Carlson* v. *Landon*, 342 U.S. 524, 544 (1952) ("This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards."); *Whitman*, 531 U.S. at 489-490 (Stevens, J., concurring) ("As long as the delegation *provides* a sufficiently intelligible principle, there is nothing inherently unconstitutional about it.") (emphasis added).

Nonetheless, petitioners assert (Pet. 3) that this Court has required the existence of an intelligible principle precisely so it can be applied during the exercise of judicial review, from which they infer that judicial review must be constitutionally required. For that proposition, they rely on *Yakus* v. *United States*, 321 U.S. 414, 426 (1944), and cases that have quoted or paraphrased it.[7] But *Yakus* actually implies just the opposite:

> The standards prescribed by the present Act, with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable *Congress, the courts and the public* to ascertain whether the Administrator, in fixing the designated prices, has conformed

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[7] Petitioners (Pet. 12-13) also quote *Skinner* v. *Mid-American Pipeline Co.*, 490 U.S. 212, 218 (1989), for the proposition that judicial review is required, but the statements about judicial review in *Skinner* reflect the fact that judicial review was, in fact, available in that case. At any rate, they trace back through *Mistretta* to *Yakus* as their ultimate source. As explained in the text, *Yakus* is contrary to petitioners' suggestion that the purpose of the intelligible-principle test is to facilitate judicial review.

> to those standards. Hence we are unable to find in them an unauthorized delegation of legislative power.

Id. at 426 (emphasis added; citation omitted); accord *Opp Cotton Mills, Inc.* v. *Administrator of the Wage & Hour Div. of the Dep't of Labor*, 312 U.S. 126, 144 (1941). As the fuller quotation makes clear, this Court has understood the purpose of the intelligible-principle test as facilitating accountability generally, rather than focusing on providing a framework for courts when they have a role in reviewing the agency's action. Thus, the intelligible-principle requirement also serves to ensure the availability of information to Congress and the public to facilitate political remedies when an agency violates statutory standards. See *Bozarov*, 974 F.2d at 1041 (concluding that the better argument is that "the purpose of an intelligible principle is simply to channel the discretion of the executive and to permit Congress to determine whether its will is being obeyed," rather than "to permit a court to ascertain whether the will of Congress has been obeyed"). That is, of course, consistent with the numerous instances in which there is no judicial review of Executive action implementing statutory delegations.

At bottom, petitioners' argument conflates two distinct questions: (1) whether an Act of Congress is constitutionally infirm because it cedes legislative authority to the Executive Branch by failing to impose sufficient restrictions; and (2) whether the Executive Branch has adhered to the restrictions imposed by the statute. The first question is the standard nondelegation inquiry, which is encompassed within the jurisdiction provided by Section 102(c)(2)(A) of IIRIRA to determine a waiver's constitutionality. By contrast, the second ques-

tion is simply whether the Executive acted *ultra vires* by violating a statute's terms. Petitioners suggest that the nondelegation doctrine requires review of both questions. But the Executive's compliance with statutory criteria, the second question, is not always subject to judicial review even now, and certainly was not historically—especially at the behest of plaintiffs, such as petitioners here, who do not assert that they have any independent property rights of their own that are adversely affected by the government's construction activities but instead rely on general environmental interests in the way the government manages *its* property. See First Am. Compl. ¶¶ 7-10.

Indeed, judicial review is the exception where it is not provided for by the APA, which did not exist until long after the nondelegation doctrine had been recognized, and which still does not apply, for example, to decisions of the President, see *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992), or to any decision that is committed to agency discretion or with regard to which judicial review would be inconsistent with the statutory scheme. See 5 U.S.C. 701(a)(1) and (2); see also, *e.g.*, *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 130-133 (1988) (holding that "prosecutorial" decisions of the General Counsel of the NLRB are not subject to judicial review, in part because review "would involve lengthy judicial proceedings in precisely the area where Congress was convinced that speed of resolution is most necessary").

Petitioners claim that "[j]udicial review is the *only* effective means of ensuring that Congress's restrictions are obeyed," Pet. 12, but they overlook the fact that many decisions are, by their nature, not subject to judicial review, and that political checks exist if the Execu-

tive exceeds the limits of a valid statute. If Congress believes that the Secretary's waiver in this case was overbroad or, as petitioners briefly suggest (Pet. 28-29), that it was not actually necessary to the expeditious construction of a border barrier in an area of high illegal entry, it can repeal or modify the waiver authority in IIRIRA, specify that NEPA or other laws are applicable to the relevant portion of the border fence, require alternative procedures in lieu of other statutes, or employ a variety of political tools to exert pressure on the Executive.[8]

c. Despite its many decisions approving grants of authority by Congress to the Executive without judicial review for statutory compliance, this Court has not suggested that the absence of such review creates a constitutional difficulty.[9] Yet, under petitioners' submission,

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[8] The Secretary's compliance with most of the statutory criteria for a waiver under IIRIRA is essentially uncontested. There is no dispute that the fence at issue is "in the vicinity of the United States border," in an "area[] of high illegal entry into the United States," and that it was installed "to deter illegal crossings." IIRIRA § 102(a), 110 Stat. 3009-554. Petitioners question (Pet. 29) whether a waiver of NEPA was "necessary" by noting that the Secretary has allowed environmental impact statements to be prepared for other (and longer) sections of border fence. But it is clear beyond cavil that the waiver of NEPA allowed the fence within the SPRNCA to be constructed more expeditiously. Before the Secretary exercised the waiver, construction was halted by a court order based upon NEPA. After the waiver, it was possible to complete construction.

[9] Petitioners claim (Pet. 14-15) that *A.L.A. Schechter Poultry Corp.* made "[t]he absence of judicial review" a factor in its nondelegation analysis. Although the Court mentioned judicial review in explaining how the National Industrial Recovery Act differed from the Federal Trade Commission Act "not only in procedure but in subject matter," 295 U.S. at 533-534, the presence or absence of judicial review made no appearance at all in the five pages of the opinion that actually discussed

in each of those cases, this Court approved an unconstitutional delegation. For example, in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948), the Court held that judicial review was not available for a decision by the Civil Aeronautics Board, with the approval of the President, to grant one entity (and deny another) the right to fly specified routes between the United States and foreign countries. *Id.* at 114. The authority to grant that right had been conferred by Congress through legislation, and this Court noted that it was irrelevant whether the authority was viewed as legislative or executive in origin because "Congress may of course delegate very large grants of its power over foreign commerce to the President." *Id.* at 109 (citing *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294 (1933)). In short, this Court concluded that the statutory authorization was valid despite the absence of judicial review. That holding forecloses petitioners' contrary argument.

Similarly, in *Knauff*, this Court upheld the statutory grant of authority to the President, delegated to the Attorney General, to impose restrictions and prohibitions on persons' entry into and departure from the United States when he determined that the public interest of the United States so required. 338 U.S. at 543-544. The Court concluded that Congress's broad authorization was constitutionally acceptable, despite the fact that the Executive's exclusion decisions applying that standard were not subject to judicial review. *Id.* at 543.

There are many other examples of this Court's approval of statutes that confer broad authority on the

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whether Congress had "delegate[d] legislative power to the President." *Id.* at 537-542.

Executive in the absence of judicial review. For example, in *Franklin*, Congress created a detailed scheme for the decennial census, at the culmination of which the President was to report to Congress on the population of each State and the number of Representatives in the House of Representatives to which it would then be entitled. The Court made clear that the President's duty in this regard was not "ministerial," 505 U.S. at 800, and that he was to exercise statutory authority to make "policy judgments" regarding the census, *id.* at 799. Nevertheless, it held that the President's exercise of that authority was subject to judicial review only for constitutional violations and not for any failure to comply with statutes, *id.* at 801—which mirrors the result prescribed by the statutory limits on judicial review in this case. If petitioners were correct, the statute at issue in *Franklin* was unconstitutional.

The same is true of *Dalton* v. *Specter*, 511 U.S. 462 (1994), in which this Court addressed a statute granting the President the uncircumscribed authority to approve or disapprove a list of military bases to be closed. See *id.* at 470. The Court concluded that statutory judicial review of the President's decision was not available. *Id.* at 476.

In *Lincoln* v. *Vigil*, 508 U.S. 182 (1993), the Court considered a statute that appropriated funds to the Indian Health Service to spend "for the benefit, care, and assistance of the Indians," 25 U.S.C. 13. The Court concluded that the Indian Health Service's decision regarding what programs to fund was not judicially reviewable under the APA. 508 U.S. at 193-194. The opinion contains no hint that the absence of judicial review meant that the statute effected an unconstitutional delegation.

Petitioners acknowledge (Pet. 17-19) the existence of cases in which this Court has approved statutory authorizations for Executive Branch officials and agencies without judicial review, but suggest that has occurred only in "narrow situations," Pet. 19, "where the actions in question fall within the inherent authority of the Executive Branch," and there is "no law to apply," purportedly making the "intelligible principle" test irrelevant, Pet. 18. That suggestion is contrary to decisions of this Court, including those described above, which are not confined to "narrow situations," exercises of inherent authority, and the existence of "no law to apply." As an additional example, in *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), the law to be applied was NEPA—one of the laws that forms the basis of petitioners' complaint here. The plaintiffs challenged a rate decision by the Interstate Commerce Commission (ICC) on the ground that it "had failed to include a detailed environmental impact statement as required by * * * NEPA." *Id.* at 679. This Court held that the ICC's decision was not subject to judicial review, even though NEPA provides legal standards that could have been applied to the decision. *Id.* at 698-699.

Thus, this Court's decisions do not support petitioners' contention that statutory grants of authority that contemplate the exercise of discretion are unconstitutional unless the Executive's actions are subject to judicial review.

4. In the second question presented, petitioners contend that the Secretary's waiver is unconstitutional because it "repeal[s]" previously enacted statutes without going through the process of bicameralism and presentment to the President. Pet. i, 21. That argument de-

pends entirely on petitioners' contention that the Secretary's waiver "has amended * * * Acts of Congress by repealing a portion of each." Pet. 20 (quoting *Clinton* v. *City of N.Y.*, 524 U.S. 417, 438 (1998)). But IIRIRA's waiver is materially similar to common and constitutionally sound waiver provisions and dramatically different from the line-item veto invalidated in *Clinton*.

Petitioners concede (Pet. 21) that it can be constitutional for Congress to authorize the Executive to waive some applications of a statute. That concession is compelled by this Court's decision in *Field* v. *Clark*, 143 U.S. 649 (1892), which upheld just such a measure,[10] and noted that similar provisions date back to at least 1799.[11]

The problem with the line-item veto in *Clinton*, by contrast, was that it authorized the Executive to "cancel" a previously enacted law and thereby deprive it of "legal force or effect." 524 U.S. at 437 (quoting the Line Item Veto Act, 2 U.S.C. 691e(4)(B)-(C)). That is not what waiver provisions do. Instead, waiver provisions allow the Executive to waive the application of existing

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[10] The statute at issue in *Field* gave the President the "power" and "duty" to "suspend" specified provisions of a statutory tariff "for such time as he shall deem just," "whenever, and so often as the President shall be satisfied that the government of any country * * * imposes duties or other extractions upon the agricultural or other products of the United States, which * * * he may deem to be reciprocally unequal and unreasonable." 143 U.S. at 680 (quoting Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 612).

[11] The Court referred to a statute authorizing the President "to remit and discontinue * * * the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, 'if he shall *deem* it expedient and consistent with the interest of the United States,' and 'to revoke such order, whenever, in his opinion, the interest of the United States shall require.'" 143 U.S. at 691 (quoting Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 615).

laws in one or more particular situations, while leaving them otherwise fully applicable.

As the district court correctly recognized, Pet. App. 10a-12a, the waiver provision in Section 102(c) of IIRIRA has the salient characteristics of the waiver at issue in *Field* (and in numerous other statutes) and lacks the key characteristic of the provision at issue in *Clinton*. NEPA and each of the other statutes whose application was waived by the Secretary retain full "legal force and effect" for all projects and all places except where the Secretary has determined that a condition stated by Congress has been satisfied. They are inapplicable only with respect to the construction of barriers and roads along the relevant portion of the border with Mexico. The same would be true of any other statutes that the Secretary might decide to waive under Section 102(c); they would retain their general legal force and effect, because the Secretary's waiver authority extends to only a tiny fraction of the universe of cases to which NEPA and similar statutes apply. That is the constitutionally dispositive difference between IIRIRA and the Line Item Veto Act.

There are also profound differences for separation-of-powers purposes between the line-item veto at issue in *Clinton* and statutory waivers like the ones at issue in *Field* and here. In *Clinton*, this Court was concerned that the President's exercise of the line-item veto "necessarily was based on the same conditions that Congress evaluated when it passed [the appropriations being 'cancelled']," and that, by issuing such a veto, the President was "rejecting the policy judgment made by Congress and relying on his own policy judgment." 524 U.S. at 443, 444. The Court emphasized that, because only a few days could elapse between the appropriation stat-

ute's enactment and the issuance of any line-item veto, the veto could not be based on anything but a policy disagreement with the very enactment of the law, rather than circumstances that had arisen after enactment. *Ibid.*

Here, by contrast, the Secretary acted consistent with, rather than contrary to, Congress's policy judgment, based on circumstances he confronted in the operation of the law. Congress enacted (and later expanded) the provision in IIRIRA authorizing the waiver of NEPA and other statutes "to ensure the expeditious construction" of border barriers. IIRIRA § 102(c)(1), as amended, 119 Stat. 306. In so doing, Congress unmistakably expressed its policy judgment that construction of the barriers and roads along the border was of such importance that it justified waiving application of environmental and other laws to the extent those laws threaten expeditious construction. Thus, in sharp contrast to *Clinton*, there is no question that the Secretary is executing (rather than rejecting) the will of Congress.

To avoid the controlling holding of *Field*, petitioners allege (Pet. 21-22) that there are three differences between the waiver at issue here and the one upheld in *Field*—namely that the waiver authority here is (1) broader (in that it includes the authority to waive requirements of multiple statutes), (2) "free standing" (meaning that one statute authorizes the Executive to waive the requirements of a different statute), and (3) not subject to judicial review. But petitioners do not explain why any of these differences matter, and, in fact, none of them does.

As explained above, the question here is whether a statute includes an unconstitutional repeal (like the line-item veto) or a constitutional waiver provision (like the

presidential waiver in *Field*). Whether that provision applies to one statute or more is irrelevant, and, indeed, Congress often authorizes waiver of multiple statutes.[12] Second, from a constitutional perspective, whether the waiver provision is part of the statute whose terms can be waived or part of a different statute is irrelevant. Congress's constitutional authority does not depend on whether it acts through a single bill or multiple bills, because every bill, once enacted, is a "Law" with its own operative force. See U.S. Const. Art. I, § 7, Cl. 2. Thus, Congress has often provided in one statute that application of a separate statute could be waived. That was true in the early years of this Nation, see *Field*, 143 U.S.

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[12] Petitioners admit (Pet. 23) that a number of statutes expressly allow for the waiver of multiple statutory provisions. See, *e.g.*, 10 U.S.C. 433(b) (waiver of "Federal laws or regulations pertaining to the management and administration of Federal agencies"); 10 U.S.C. 2350b(c) (waiver, with respect to contract, of "any provision of law," other than two specified laws, that prescribes contractual procedures or requirements); 10 U.S.C. 2671(b) (Supp. V. 2005) (waiver or modification of "the fish and game laws of a State"); 25 U.S.C. 3406 (authorizing "Secretary of each Federal agency providing funds" for program to waive "any statutory requirement, regulation, policy, or procedure promulgated by that agency"); 43 U.S.C. 1652(c) (authorizing Secretary of the Interior and other federal officials and agencies to "waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of [the Trans-Alaska Pipeline Authorization Act]"); Act of Oct. 6, 2006, Pub. L. No. 109-304, § 4, 120 Stat. 1490 (to be codified at 46 U.S.C. 501(a)) (waiver of "navigation or vessel-inspection laws * * * to the extent the Secretary considers necessary in the interest of national defense"); Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 5107(a)(2), 120 Stat. 42 (providing for waiver of "such provisions of law * * * as are necessary to implement [specified statutory provision] on a timely basis"); Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 601(b), 102 Stat. 4826 (25 U.S.C. 1661 note) (authorizing waiver of "the Indian preference laws").

at 685 (citing the "act of December 19, 1806," authorizing the President to suspend the operation of a prior act), and remains true today.[13] Third, it is not at all clear that the President's exercise of the waiver authority in *Field* was subject to greater judicial review than the waiver authorized here. Cf. *Franklin*, 505 U.S. at 801 (reviewing President's actions "for constitutionality" but not "for abuse of discretion under the APA"). But even if the waiver in *Field* had been subject to greater judicial review than the waiver here, that fact would have no bearing on the relevant question—whether the waiver is an unconstitutional statutory repeal. That question is wholly separate from what degree of judicial review is available.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2008

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[13] Indeed, each statute listed in the preceding footnote provides for the waiver of one or more previously enacted statutory provisions.

APPENDIX

Section 102(a)-(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-554 to 3009-555, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 102, 119 Stat. 306, and the Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, provides as follows:

(a) IN GENERAL.—The Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

(b) CONSTRUCTION OF FENCING AND ROAD IMPROVEMENTS IN THE BORDER AREA.—

(1) SECURITY FEATURES.—

(A) REINFORCED FENCING.—In carrying out subsection (a), the Secretary of Homeland Security shall provide for least [*sic*] 2 layers of reinforced fencing, the installation of additional physical barriers, roads, lighting, cameras, and sensors—

(i) extending from 10 miles west of the Tecate, California, port of entry to 10 miles east of the Tecate, California, port of entry;

(ii) extending from 10 miles west of the Calexico, California, port of entry to 5 miles east of the Douglas, Arizona, port of entry;

(iii) extending from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas;

(iv) extending from 5 miles northwest of the Del Rio, Texas, port of entry to 5 miles southeast of the Eagle Pass, Texas, port of entry; and

(v) extending 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry.

(B) PRIORITY AREAS.—With respect to the border described—

(i) in subparagraph (A)(ii), the Secretary shall ensure that an interlocking surveillance camera system is installed along such area by May 30, 2007, and that fence construction is completed by May 30, 2008; and

(ii) in subparagraph (A)(v), the Secretary shall ensure that fence construction from 15 miles northwest of the Laredo, Texas, port of entry to 15 southeast of the Laredo, Texas, port of entry is completed by December 31, 2008.

(C) EXCEPTION.—If the topography of a specific area has an elevation grade that exceeds 10 percent, the Secretary may use other means to secure such area, including the use of surveillance and barrier tools.

(2) PROMPT ACQUISITION OF NECESSARY EASEMENTS.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act [8 U.S.C. 1103(b)] (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and

shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) SAFETY FEATURES.—The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this subsection not to exceed $12,000,000. Amounts appropriated under this paragraph are authorized to remain available until expended.

(c) WAIVER.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) FEDERAL COURT REVIEW.—

(A) IN GENERAL.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have juris-

diction to hear any claim not specified in this subparagraph.

(B) TIME FOR FILING OF COMPLAINT.—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) ABILITY TO SEEK APPELLATE REVIEW.—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

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No. 07-1180

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In the Supreme Court of the United States

DEFENDERS OF WILDLIFE AND SIERRA CLUB,

Petitioners,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY

Respondent.

On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia

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The government strives mightily to depict the Secretary's Section 102(c) waiver authority as a commonplace measure indistinguishable from prior delegations of legislative power and prior waiver provisions upheld by this Court. That argument ignores reality, including:

- The three amicus briefs that confirm the continuing importance of the constitutional questions presented in the petition as well as the waiver authority's constitutional defects;
- The Secretary's new, and extremely broad, April 2008 waivers—not even discussed by the government—that have engendered very substantial controversy, including new lawsuits challenging the validity of Section 102(c) waivers;
- The government's inability to point to even a single decision by this Court relying on the intelligible principle standard to uphold a statute against a delegation challenge where the exercise of the delegated authority was not subject to some form of judicial review for compliance with the congressional standard. The district court rulings on which the government relies thus have no support in this Court's decisions.

Only this Court can dispel the profound and persistent state of uncertainty that attends the Secretary's continuing issuance of waivers and the associated continued stream of litigation. "There are of course no court of appeals decisions" (Opp. 9 n.4) permitted under the truncated jurisdictional provisions at issue. District court decisions, by their nature, cannot generate binding precedent even within,

much less across, particular districts. Until this Court addresses these issues, therefore, there will be no authoritative answers to the important constitutional questions posed by the Secretary's extraordinarily broad waiver authority—and its insulation from judicial review for compliance with Congress's standard—that is at issue in this case.

The government opposes certiorari on the ground that further review would frustrate the goal of expedition reflected in the "special statutory framework" (Opp. 10) that eliminates court of appeals review and bars consideration of nonconstitutional claims anywhere. But the newly-filed litigation over Section 102(c), combined with the truncated review provisions and the short time-frame for the proposed construction of the fence, make immediate review by this Court imperative. Contrary to the government's claim, the Secretary's "statutory obligation to achieve operational control over the Nation's borders within a matter of months" (Opp. 11) is not a reason to deny certiorari; rather, it is a reason to *grant* review and then to expedite this Court's consideration of the case, a procedure petitioners would welcome.

A. This Court Should Grant Review Now To Resolve Definitively The Continuing Controversy Surrounding The Constitutionality Of The Secretary's Waiver Authority.

The government opposes certiorari on the ground that "there is no split of authority" concerning the constitutionality of Section 102(c) of IIRIRA (Opp. 9). This attempt to force-fit the "circuit conflict" template onto the petition ignores the principal grounds presented for granting certiorari: the persistent state of legal controversy that will attend the continuing

exercise of the Secretary's waiver authority; the division in the lower courts with respect to the role of judicial review in nondelegation analysis; and the inability of district courts to abate such controversy.

1. Any doubt regarding the continuing importance of the legal issues presented here is eliminated by the Secretary's issuance in April 2008 of two new waivers, one of 27 laws covering 22 miles of fencing in Hidalgo County, Texas, 73 Fed. Reg. 19,077 (Apr. 8, 2008), the other wiping out over 35 laws with respect to more than *four hundred seventy miles* of fence in *four states*, 73 Fed. Reg. 18,293 (Apr. 3, 2008).[1]

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[1] The broader waiver applies to the following federal statutes, as well as "all federal, state or other laws, regulations, and legal requirements of, deriving from, or related to the subject" of these laws: National Environmental Policy Act, (42 U.S.C.§ 4321 et seq.)); the Endangered Species Act, 16 U.S.C. § 1531 et seq.)); the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (33 U.S.C. 1251 et seq.)); the National Historic Preservation Act 16 U.S.C. § 470 et seq.)); the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq.); the Clean Air Act, 42 U.S.C. § 7401 et seq.; the Archeological Resources Protection Act, 16 U.S.C. § 470aa et seq.; the Safe Drinking Water Act, 42 U.S.C. § 300f et seq.; the Noise Control Act, 42 U.S.C. § 4901 et seq.); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.; the Archaeological and Historic Preservation Act, 16 U.S.C. § 469 et seq.; the Antiquities Act, 16 U.S.C. § 431 et seq.); the Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 et seq.); the Wild and Scenic Rivers Act, 16 U.S.C. § 1281 et seq.; the Farmland Protection Policy Act, 7 U.S.C. § 4201 et seq.; the Coastal Zone Management Act, 16 U.S.C. § 1451 et seq.; the Wilderness Act, 16 U.S.C. § 1131 et seq.; the Federal Land Policy and Management Act, 43 U.S.C. § 1701 et

The scope and diversity of the abrogated laws is breathtaking. Cast aside are not just every significant environmental protection and land use statute but also laws protecting Native American graves and religious practices as well as freedom of religion generally. The Secretary has waived the organic act of one executive agency (the National Park Service) in its entirety. He has even eliminated protection of the bald eagle, the symbol of our Nation.

Not surprisingly, given the impact of the Secretary's most recent waivers and the immense public controversy surrounding them,[2] this case is not the

seq.); the National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd-668ee); the Fish and Wildlife Act of 1956, 16 U.S.C. § 742a, et seq.; the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq.; the Administrative Procedure Act, 5 U.S.C. § 551 et seq.; the Otay Mountain Wilderness Act of 1999, Pub. L. No. 106-145; Sections 102(29) and 103 of Title I of the California Desert Protection Act, Pub. L. No, 103-433, 50 Stat. 1827, the National Park Service Organic Act, 16 U.S.C. § 1, 2-4); the National Park Service General Authorities Act, 16 U.S.C. §1a-1; Sections 401(7), 403, and 404 of the National Parks and Recreation Act of 1978, Pub. L. No. 95-625; Sections 301(a)-(f) of the Arizona Desert Wilderness Act, Pub. L. No. 101-628; the Rivers and Harbors Act of 1899, 33 U.S.C. § 403); the Eagle Protection Act, 16 U.S.C. § 668 et seq.; the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq.; the American Indian Religious Freedom Act, 42 U.S.C. § 1996; the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb; the National Forest Management Act of 1976, 16 U.S.C. § 1600 et seq., and the Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528-531).

[2] See, *e.g.*, Rusty Dornan, *Border-fence Dispute Snares Rare Jaguars*, CNN, May 5, 2008, *available at* http://www.cnn.com/2008/ TECH/ science/ 05/ 05/ jaguars.fence/index.html; Op. Ed., *Flattened By The Wall: Fence-Builders Should Not Be Allowed to Bulldoze Past All Laws*, The (Syracuse) Post-Standard, April 15, 2008, *available at* http://www.syracuse.com/ opinion/ index.ssf?/ base/ opinion-2/ 1208249823169420.xml&coll=1; Op.

only pending challenge to the Secretary's actions. Two new suits have been filed in the last month alone. See *County of El Paso* v. *Chertoff*, No. 08-0196 (W.D. Tex. filed June 2, 2008); *Texas Border Coalition* v. *Chertoff*, No. 08-00848 (D.D.C. filed May 16, 2008).

By granting review here, this Court would resolve conclusively the issue in those cases; otherwise, that litigation—and the associated uncertainty—will continue. Absent review by *this* Court, moreover, *none* of these district court lawsuits will quiet the controversy surrounding the fence, because none, as a matter of law, can. It is well established that district court decisions do not create binding precedent for other district courts, either within or across districts. See, *e.g.*, *Gould* v. *Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) (Posner, J.) ("[a] district court decision binds no judge in any other case"). Because Congress, in addition to restricting district court review

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Ed., *U.S. Wrong to Bypass Laws for Border Fence*, The San Diego Union Tribune, Apr. 3, 2008, *available at* http://www.signonsandiego.com/ news/ op-ed/ editorial1/ 20080403-9999-lz1ed3top.html; Op. Ed., *Wall Project Must Not Trample Citizens' Rights, Prerogatives*, The Arizona Daily Star, Apr. 3, 2008, *available at* http://www.azstarnet.com/ altds/pastframe/opinion/232564; Op. Ed., *Skirting of Rules Shows Hypocrisy of Government*, The Yuma Sun, Apr. 2, 2008, *available at* http://www.yumasun.com/ opinion/ rules_40766___article.html/ hypocrisy_roads.html; Editorial, *Border Fence Waivers Show Feds' Arrogance*, The San Antonio Express-News, Apr. 3, 2008, *available at* http://www.mysanantonio.com/ opinion/ editorials/ stories/ MYSA040408.01O.Fence1ed.25ff92c.html; Editorial, *Michael Chertoff's Insult*, N.Y. Times, Apr. 3, 2008, *available at* http://www.nytimes.com/ 2008/ 04/ 03/ opinion/ 03thu3.html?_r=1&em&ex=1207368000&en=4c861a0cf3a609a3&ei=5087%0A&oref=slogin.

to constitutional challenges, extinguished jurisdiction of the courts of appeals to review decisions challenging the Secretary's waivers (IIRIRA § 102(c)(2)(A)-(C)), the *only* court that can authoritatively resolve the issue presented in this case is *this* one. Until that happens, adversely affected parties will continue to seek legal redress, the federal government will continue to expend the resources necessary to defend the Secretary's actions, and district courts will continue to be obliged to render decisions, for as long as it takes the Government to complete the border fence.[3]

2. We explained in the petition (at 15-16) that the district court's ruling (and the government's position) conflict with lower court decisions in other statutory contexts holding that the availability of statutory judicial review is essential to upholding delegations of legislative authority under the intelligible principle standard.

The government responds (Opp. 9) that "this Court vacated the only decisions * * * that invalidated statutory provisions on unconstitutional delegation grounds because of the unavailability of judicial review." But this Court did not reject the principle that judicial review is a key element of the intelligible principle test. To the contrary, that principle was reaffirmed in both cases—in *South Dakota*, the government voluntarily revised its regulation to authorize judicial review (rather than seeking reversal

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[3] Although the 14-mile fence segment that was the subject of the waiver at issue in this action has been substantially completed, the government concedes (Op. 8-9 n.3) that the continuing possibility of relief to abate violations of law associated with that fence segment precludes a claim of mootness.

of the lower court's decision on the merits) and sought a remand for reconsideration (Pet. 15-16 n.5); and in *Widdowson* the Court remanded for reconsideration in light of its decision in *Touby* that the relevant statute provided sufficient judicial review to satisfy the nondelegation doctrine's requirement.

The government also fails even to acknowledge the two appellate decisions in which courts upheld delegations on the ground that the relevant statutes provided for judicial review (see Pet. 15). And it ignores the fact that in *Bozarov*, which the government characterizes as "the most relevant decision" (Opp. 10), the court of appeals expressly relied on the availability of some judicial review in upholding the delegation (see Pet. 16 n.6).

The lower court decisions thus confirm that judicial review is a key part of the intelligible principle test. Indeed, the government does not point to a single lower court decision outside the Section 102(c) context endorsing its position that judicial review is irrelevant. The stark contrast between the decision below and the other lower courts' decisions addressing this issue provides yet another basis for granting review here.[4]

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[4] The government states (Opp. 15) that the legal argument advanced in the petition was "neither pressed nor passed upon in the court below * * *." But the government does not make a claim of waiver, nor could it. The contention that Section 102(c) violates the nondelegation doctrine was squarely advanced below, and that argument relied in part on the lack of judicial review. Certainly the government, which frequently modifies in this Court the legal arguments advanced in lower courts, does not argue that a party may only advance in this Court the precise legal argument it advanced below.

3. As the government notes, Congress directed the Secretary to take "all actions the Secretary determines necessary and appropriate," including the construction of fences, "to achieve and maintain operational control over the entire" United States border within an 18-month period. Secure Fence Act, Pub. L. No. 190-367, § 2(a), 120 Stat. 2638. The government argues that this "statutory obligation to achieve operational control over the Nation's borders within a matter of months" counsels against the granting of certiorari. Opp. 11.

In fact, exactly the opposite is true. The very speed with which the Secretary is obliged to complete the fence—and that he contends impels him to abrogate all manner of law in the process—makes it all the more imperative that this Court grant certiorari now to resolve the constitutional question definitively

B. Judicial Review Is An Essential Element Of The Intelligible Principle Standard.

The bulk of the government's Opposition consists of arguments on the merits. Put simply, however, there is no support in this Court's decisions for the government's position (Opp. 11) that *existence* of an intelligible principle is the sole consideration of the nondelegation inquiry and judicial review for compliance with that principle is entirely irrelevant. That contention turns on its head a fundamental pillar of separation of powers by arguing that absence of judicial oversight does not implicate constitutional concerns.

The government is unable to cite any case in which the Court has expressly stated that judicial review is *not* required to satisfy the intelligible prin-

ciple standard. Indeed, we have not been able to locate a decision of this Court upholding a delegation under the intelligible principle standard where the agency's compliance with the intelligible principle was not subject to such judicial review.

The cases on which the government relies (Opp. 19-23) all involve delegations *not* subject to the intelligible principle standard (see Pet. 17-19).[5] Thus, in each of the cases that it cites, the delegation was upheld without reference to the intelligible principle standard, either because there was no law to apply (*United Food & Commercial Workers* and *Lincoln*) or because of the Executive's inherent authority (*Waterman Steamship Corp.* and *Knauff*).[6]

Moreover, the government blithely ignores the repeated statements in this Court's opinions that judicial review is an important element of the intelligible principle standard. Pet. 13-15. While the government understandably prefers formulations that

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[5] The government conceded below that the constitutionality of Section 102(c) is governed by the intelligible principle standard. See Pet. 19. Its assertion that it "possesses independent authority over the subject matter" (Opp. 13-14) is therefore irrelevant. And it plainly does not possess independent authority over the subject matter relevant here—the subjects of the waived statutes.

[6] The government's reference (Opp. 23) to *Students Challenging Regulatory Agency Procedures* is baffling, because the passage cited involved the district court's inability to grant interim relief, not a complete preclusion of judicial review. Similarly, *Franklin* and *Dalton* did not involve nondelegation claims. Moreover, the challenges in *Franklin* where entirely procedural—there was no assertion that the President failed to comply with the substantive statutory standard—and the statute in *Dalton* imposed no constraints on the President's discretion, the paradigmatic situation in which there is no law to apply.

do not mention judicial review, this Court in fact has referred to the courts' role in applying the standard.

Finally, the importance of judicial review here is confirmed by the government's half-hearted attempt (Opp. 20 n.8) to justify the Secretary's waiver. If all that is required for a waiver is that it "allowed the fence* * * to be constructed more expeditiously," then a waiver will be justified in any case in which any statute may possibly apply to construction of the fence. If Congress meant to adopt that incredibly lenient test, however, it simply would have enacted a blanket waiver itself and saved the Secretary the trouble of having to issue individual waivers. Congress intended a more focused inquiry, with the rationale spelled out by the Secretary—something that will occur only with statutory judicial review.

C. The Secretary's Waiver Is Equivalent To The Repeal Invalidated In *Clinton*.

To avoid *Clinton* v. *City of New York.*, 524 U.S. 417 (1998), the government attempts to distinguish "waiver" from "repeal" on the ground that "waivers" suspend the application of existing law "in one or more particular situations, while leaving them otherwise fully applicable." Opp. at 24-25. But the *Clinton* Court stated that the *practical effect* of the Executive's action, not the term applied to it, is dispositive. The government's distinction elevates form over substance by turning entirely on whether the relevant underlying law is broad or narrow. Waiver of a statute applicable only along the border, or only to construction of a border wall, for example, would deprive the law of all substantive force and effect, and be indistinguishable from repeal of such a law in its entirety.

The government also argues (Opp. 24) that the Secretary's waiver closely resembles the tariff waiver upheld in *Field* v. *Clark*, 143 U.S. 649 (1892). As we discuss in the petition (at 21-24), the waiver provision here is far different from the one before the Court in *Field*. The government asserts (Opp. 27-28) that those differences do not matter, but again it is unable to point to any precedent of this Court upholding under *Field* a provision with the unprecedented characteristics of Section 102(c). Moreover, a key factor in *Field*—also central to the Court's determination in *Clinton*—was whether the Executive's action is mandatory upon the occurrence of particular future events, and thus truly represents Congress's legislative decision. 143 U.S. at 693; see also 524 U.S. at 443-44. The discretionary waiver provision here fails that test. Review is warranted so that this Court may determine whether *Field*'s rationale applies in this very different context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DEFENDERS OF WILDLIFE AND SIERRA CLUB,
Petitioners,

v.

MICHAEL CHERTOFF,
Secretary of Homeland Security,
Respondent.

On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia

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Petitioners,

v.

MICHAEL CHERTOFF,
Secretary of Homeland Security,
Respondent.

On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia

STATEMENT

William D. Araiza and the other professors of constitutional and administrative law listed herein respectfully submit this *amicus* brief in support of the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICI*

Amici are professors who study, teach and publish on constitutional and administrative law. *Amici* share the view that Section 102 of the Illegal

[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"), raises profound, unanswered questions concerning the elimination of any judicial review (except on constitutional questions) of an executive agency's delegated, wholly discretionary power to waive any statutes, whether federal, state or local, that the agency sees fit in order to accomplish a given goal. Section 102(c) of IIRIRA precludes judicial review while granting unprecedented power to the Secretary of Homeland Security to waive any laws on the books, including laws that extend far beyond that agency's area of expertise and regulatory authority. This case, in a starker fashion than any before, raises the question of whether the "intelligible principle" requirement for an exceptionally broad delegation of one branch's powers can be satisfied in the absence of judicial review. Given that the agency at this moment is wielding the waiver power conferred upon it by Section 102 without constraint, this case squarely presents the fundamental question of whether the Constitution allows Congress to grant unlimited, unfettered and unreviewable power to an executive branch official to waive any law he or she deems "necessary" to accomplish a stated goal. For this reason, *amici* believe this case warrants the Court's review.

Amici represent a wide range of experiences, backgrounds and philosophical perspectives. Many *amici* are practitioners who have litigated constitutional or administrative cases. All of the *amici* have published and lectured extensively on issues of constitutional and/or administrative law. *Amici* sign this brief in their individual capacities.

A list of the *amici* appears as Appendix A, reproduced at 1a-3a.

SUMMARY OF ARGUMENT

The assurance of judicial review has been at the heart of this Court's review of constitutional challenges to Congressional delegations of power. In particular, the availability of judicial review underlies this Court's "intelligible principle" jurisprudence. *See, e.g., Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 216 (1989); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 426 (1944). However, this Court has never directly addressed the question of whether, in the case of an exceptionally broad delegation, satisfaction of the "intelligible principle" test requires the availability of judicial review. Put another way, can the "long-standing principle" that Congress may delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions *such that a Court could 'ascertain* whether the will of Congress has been obeyed . . .'" be satisfied if the "court" is entirely removed from the principle's operation? *See Skinner*, 490 U.S. at 216 (emphasis added). This Court has never answered this question, which is of critical importance to ensuring that Congress's delegation of authority to executive branch agencies is done in a manner consistent with separation of powers.

Section 102 of the IIRIRA presents this Court with the most sweeping and starkest possible context to address this question, because Congress could scarcely have made a broader delegation than this one. Section 102(c)(1) of the IIRIRA grants the Secretary of Homeland Security, "[n]otwithstanding any other provision of law," the "authority to waive

all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." Pursuant to this authority, the Secretary already has issued five waivers nullifying 30 statutes and all rules, regulations and legal requirements deriving from or related to the subject matter of those statutes along much of the border with Mexico. Among other laws, almost every federal environmental and historic preservation statute has been waived, as have the Religious Freedom Restoration Act and the Administrative Procedure Act.

The Secretary has asserted that these sweeping waivers are "necessary" but, contrary to what normally might occur in the context of reviewable agency action, has offered no reasons why. None of these waivers can be reviewed by the courts except on constitutional grounds. IIRIRA § 102(c)(2)(A).[2] Neither this Court, nor any court of appeals, has ever been asked to review a delegation to suspend statutory requirements that is this far reaching, nor has any court ever upheld as broad a delegation of legislative power to the executive branch in the absence of judicial review.

We submit that the Court should grant the writ of certiorari to address whether such a delegation can be made without judicial review. In addition, this Court may wish to take this opportunity to consider whether there are circumstances under which the Congressional delegation must be subjected to greater scrutiny, such as when a delegation is

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[2] The statute also precludes any right of appeal to the Courts of Appeal following a determination of a constitutional question. IIRIRA § 102(c)(2)(C).

especially broad or when an agency is permitted to waive laws that are outside the scope of its expertise. The unrestricted grant of power to an unelected official to waive any law on the books he deems "necessary" for his purposes, including not only substantive laws but also procedural statutes, raises the specter of arbitrary power and the loss of liberty. "Liberty is always at stake when one or more branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). We respectfully submit that a writ of certiorari should issue in this case.

ARGUMENT

I. SECTION 102(c) OF IIRIRA PRESENTS A UNIQUELY BROAD DELEGATION WITHOUT JUDICIAL REVIEW

Whether the non-delegation principle requires judicial review for especially broad grants of policy-making authority is a question presented here in the context of an unprecedently sweeping delegation. We will return shortly to the jurisprudential concerns that, we suggest, compel issuance of a writ of certiorari here. But first it is appropriate to consider the breadth and open-ended nature of Section 102(c)'s delegation and the Secretary's sweeping exercise of that power to date.

Section 102(c) of the IIRIRA directs the Secretary of Homeland Security to take such actions as may be necessary to install physical barriers and roads (including the removal of obstacles to the detection of illegal immigrants) in the vicinity of the United States border. To achieve this end, Section 102(c)(1) provides:

> (c)(1) Notwithstanding any other provision of law, the Secretary of Homeland Security shall

> have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1).

This delegation of authority to an executive agency to waive any law or legal requirement, whether federal, state or local, is unprecedented. Certainly a number of federal laws have authorized an agency official to waive legal requirements in particular circumstances. But such delegations have typically involved directions to the executive to waive particular provisions of laws. Moreover, such directions usually instruct or authorize the executive to waive only provisions of the same law containing the waiver authority itself, and such waivers usually are subject to judicial review.

Here the delegation, while limited as to purpose, is unlimited as to application. The Secretary of Homeland Security, upon a mere pronouncement that he finds waiver "necessary," can waive any law promulgated by any authority in effect anywhere in the nation. As far as we can determine Congress has never delegated to a federal agency anything approaching such an omnibus waiver authority. As an independent study by the Congressional Research Service concluded:

> After a review of federal law . . . we were unable to locate a waiver provision identical to that of § 102 of H.R. 418—i.e., a provision that contains 'notwithstanding language,' provides a secretary

> of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws. Much more common, it appears, are waiver provisions that (1) exempt an action from other requirements contained in the Act and authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar laws.

Congressional Research Service Memorandum, *Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Feb. 9, 2005, at 7a-8a, reproduced at Appendix B.

Moreover, prior delegations to an executive agency of the power to waive laws usually, if not always, have involved the waiver of laws within the purview of that agency's expertise and specialized knowledge. The broad delegations this Court has reviewed in the past differ from "the delegation at issue here in that agencies often develop subsidiary rules under the statute." *Clinton*, 524 U.S. at 489 (Breyer, J., dissenting). "Doing so diminishes the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation." *Id.* (citing 1 K. Davis, *Administrative Law* § 3:15, pp. 207-208 (2d ed. 1978)).

> Such delegations of power permit the legislature to declare the end sought and leave technical matters in the hands of experts, or to leave to others the task of devising specific rules to carry out congressional policy in a variety of factual situations. Where, as is often the case, even major policy decisions may turn on specialized knowledge and expertise beyond legislative ken, delegation of rulemaking power may be made under broad standards to a body chosen

> for familiarity with the subject matter to be regulated.

McGautha v. California, 402 U.S. 183, 276 (1971) (Brennan, J., dissenting), *vacated on other grounds sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972).

Section 102(c) of IIRIRA, by contrast, gives the Secretary of Homeland Security the authority to waive rules and regulations in every area of the law, far outside his department's specialized knowledge and expertise, and regardless of what those with specialized knowledge and expertise have concluded is necessary and appropriate when developing the rules and regulations waived. This delegation is uniquely suspect in that it allows the Secretary to selectively and without reason waive not only substantive but procedural statutes, such as the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA").

The Secretary's exercise of the Section 102(c) waiver delegation has been as unfettered in practice as it is unlimited in authorization. On September 22, 2005, the Secretary invoked his authority under IIRIRA § 102(c) to waive "in their entirety," along a 14 mile stretch of the U.S. border with Mexico near San Diego, "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* ("NEPA"), the entirety of the APA, and six other environmental and historic preservation statutes. 70 Fed. Reg. 55,622 (Sept. 22, 2005). On January 19, 2007, the Secretary invoked his Section 102(c) authority to waive in Arizona's Barry M. Goldwater Range "all federal, state or other laws, regulations and legal requirements of, deriving from or related to the

subject of" NEPA, the APA and eight other statutes. 72 Fed. Reg. 2,535 (January 19, 2007).[3]

On October 26, 2007, two weeks after the issuance of a temporary restraining order by the district court below (following a finding that the petitioners had demonstrated a substantial likelihood of success on the merits that the Secretary had violated NEPA and the Arizona-Idaho Conservation Act of 1988), the Secretary invoked his authority under Section 102(c) of IIRIRA to waive in the San Pedro Riparian National Conservation Area (the "SPRNCA") "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" NEPA, the Arizona-Idaho Conservation Act, and seventeen other laws, including the entirety of the APA.[4] He asserted that the waiver of these laws in the SPRNCA was "necessary . . . to ensure the expeditious construction of the barriers and roads," but provided no explanation of the reasons for that determination. 72 Fed. Reg. 60,870 (Oct. 26, 2007). This is the waiver specifically addressed in the petition for a writ of certiorari.

On April 1, 2008, the Secretary issued a sweeping waiver covering 470 miles of the border from California to Texas. Again invoking his authority under Section 102(c) of the IIRIRA, the Secretary waived "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" 30 laws, again including NEPA, the

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[3] The Barry M. Goldwater Range is described in the Bureau of Land Management's "Legal Description of Barry M. Goldwater Range Withdrawal, AZ." 66 Fed. Reg. 59,813 (Nov. 30, 2001).

[4] The other laws identified by name in the October 26, 2007 waiver are listed in the Petition. See *Defenders of Wildlife*, Pet. App. 7, n.3.

Arizona-Idaho Conservation Act and the entirety of the APA.[5] Secretary Chertoff asserted that the waiver of these laws, in their entirety and across much of this nation's Mexican border, is "necessary . . . to ensure the expeditious construction of the barriers and roads." The Secretary provided no explanation of why he found it "necessary" to waive all provisions of 30 statutes including, for instance, the Religious Freedom Restoration Act (42 U.S.C. § 2000bb) prohibiting the federal government from substantially burdening a person's exercise of religion. 73 Fed. Reg. 19,078 (April 8, 2008).

Also on April 1, 2008, the Secretary issued a waiver covering a 22 mile stretch in Hidalgo County, Texas. The Hidalgo County waiver is identical in scope to

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[5] This waiver was corrected on April 8, 2008 to include geographical information on the project areas. In addition to the specific laws waived in the Secretary's October 26, 2007 pronouncement, on April 1 the Secretary specifically waived the following laws: the Coastal Zone Management Act (16 U.S.C. § 1451 *et seq.*); the Wilderness Act (16 U.S.C. § 1131 *et seq.*); the National Wildlife Refuge System Administration Act (16 U.S.C. §§ 668dd-668ee); the Fish and Wildlife Act of 1956 (16 U.S.C. § 742a *et seq.*); the Otay Mountain Wilderness Act of 1999 (Pub. L. 106-145); Sections 102(29) and 103 of Title I of the California Desert Protection Act (Pub. L. 103-433); 50 Stat. 1827, the National Park Service Organic Act (16 U.S.C. §§ 1, 2-4); the National Park Service General Authorities Act (16 U.S.C. §§ 1a-1 *et seq.*); Sections 401(7), 403 and 404 of the National Parks and Recreation Act of 1978 (Pub. L. 95-625); Sections 301(a)-(f) of the Arizona Desert Wilderness Act (Pub. L. 101-628); the Rivers and Harbors Act of 1899 (33 U.S.C. § 403); the Eagle Protection Act (16 U.S.C. § 668 *et seq.*); the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*); the American Indian Religious Freedom Act (42 U.S.C. 1996); the Religious Freedom Restoration Act (42 U.S.C. § 2000bb); the National Forest Management Act of 1976 (16 U.S.C. § 1600 *et seq.*); and the Multiple Use and Sustained Yield Act of 1960 (16 U.S.C. §§ 528-531).

the Secretary's other April 1, 2008 waiver. 73 Fed. Reg. 19,077 (April 8, 2008).[6]

To date, the Secretary has seen fit to waive laws protecting the environment, public health, freedom of religious exercise and historic resources. But with no more than the unsupported assertion of "necessity" that he has invoked to waive those laws, the Secretary also may waive any other law he desires. He is equally free to waive the requirements of the Fair Labor Relations Act to halt a strike, or the provisions of the Occupational Safety and Health Act to force workers to endure unsafe working conditions, or the state speed limits in California, New Mexico, Arizona and Texas to race equipment and materials to construction sites. Section 102(c) gives the Secretary the power to waive treaties with Mexico governing the location of the border, management of the border zone, and movement of water, goods and services across the border so long as he deems it, in his sole and unreviewable discretion, "necessary." Indeed, under Section 102(c) the Secretary could waive the immigration laws and regulations, hire illegal aliens, and pay them less than minimum wage if he deems it necessary to build the fence.

It also bears noting that the Secretary has specifically waived all state and local laws relating to the subjects of the 30 federal laws named in his waivers. This includes all state and local laws dealing with the environment, water and riparian rights, historic preservation, Native American religious freedom and practices, and other topics. The constitutional basis for this sweeping, unlegislated

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[6] This waiver, too, was corrected on April 8 to describe the project area.

preemption of the laws of four states raises an additional set of pressing constitutional questions.

We recite these facts to demonstrate the sweeping scope of the waivers already in place. As individuals who study, teach and publish on constitutional and administrative law, *amici* have differing views of the constitutional jurisprudence establishing the outer limits of permissible delegation of powers and separation of powers. We are, however, unanimous in our view that, whatever those limits may be, the sweeping delegation to the Homeland Security Secretary in Section 102(c) of the IIRIRA, when coupled with the preclusion of judicial review, raises significant questions that this Court should address about whether there has been an unconstitutional delegation of power and, more generally, whether the separation of powers doctrine has been violated.

II. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER EXCEPTIONALLY BROAD DELEGATIONS TO UNELECTED MEMBERS OF THE EXECUTIVE BRANCH REQUIRE THE AVAILABILITY OF JUDICIAL REVIEW

Section 102(c) of the IIRIRA forbids judicial challenges to Secretary Chertoff's waiver determinations. After vesting exclusive jurisdiction in the district courts, section 102(c)(2)(A) of the statute sharply limits that jurisdiction:

> A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

The Court has consistently highlighted the availability of judicial review of administrative action as an essential predicate to upholding broad delegations of congressional power under the "intelligible principle" requirement. *See, e.g., Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 216 (1989); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 436 (1944). The IIRIRA's prohibition of judicial review presents a critical question warranting a grant of certiorari.

It is a longstanding principle of this Court that Congress can delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed.'" *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 216 (1989) (*quoting Yakus v. United States*, 321 U.S. 414, 426 (1944)); *see also Mistretta v. United States*, 488 U.S. 361, 379 (1989) (same). The availability of judicial review ensures executive compliance with congressional will, and thereby ensures that the executive branch is limited to enforcing the law, rather than making it. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). For instance, the broad rulemaking delegation approved of by this Court in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), was subject to judicial review under the APA. 531 U.S. at 475-76. "Judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Touby v. United States*, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) (*citing Skinner*, 490 U.S. at 218-219).

In the modern era of broad delegations to administrative agencies, judicial review assures the continuing validity of Chief Justice Marshall's observation:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 9 Pet. 8, 28-29, 9 L. Ed. 31 (1835). Therefore, our "constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates. . . ." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (1999) (Thomas, J., dissenting). This insight underlies the well-established presumption of the reviewability of agency action. *Abbott Laboratories*, 387 U.S. 136, 140 (1967). "Concepts of control and accountability define the constitutional requirement." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three judge panel) (Leventhal, J.).[7]

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[7] When Congress intends to preclude judicial review, the Court has required Congress to do so with "specific language or specific legislative history that is a reliable indicator of congressional intent." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673 (1986) (citing *Black v. Community*

Broad congressional delegations of power to the executive likewise pass constitutional scrutiny in significant part because they provide for judicial review of their implementation.[8] In *Chadha* the Court, distinguishing lawmaking (which requires adherence to bicameralism and presentment) from administrative action (which does not), relied on the limitations constraining administrative action, limitations that assumed the existence of judicial review:

> The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that

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Nutrition Institute, 467 U.S. 340, 349, 351 (1984)), *superseded by statute*, Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. § 1395ff (1992). "Clear and convincing evidence" is required to overcome the "strong presumption that Congress did not mean to prohibit all judicial review of executive action." *Bowen*, 476 U.S. at 671-72 (citing and quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) and *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)).

[8] One scholar has connected judicial review of agency action and non-delegation as follows: "Framed as a sort of presumption, the notion was that [judicial] review was necessary to assuage concerns over the constitutionality of the New Deal regulatory statutes. Review was part of a constitutional quid pro quo: courts would decline to employ the nondelegation doctrine to overturn statutes and, in return, courts would preserve the power to review agency decisions." Daniel D. Rodriquez, *The Presumption of Reviewability: A Study In Canonical Construction and Its Consequences*, 45 Vand. L. Rev. 743, 755 (1992). Of course this statement does not contemplate the situation present in this case, where a constitutionally troubling delegation comes unaccompanied by judicial review. *Cf. Touby v. United States*, 500 U.S. 160 (1991) (rejecting an argument that a statute constituted an unconstitutional delegation due to its lack of judicial review, not by concluding that judicial review was unnecessary, but rather by finding an adequate provision of judicial review).

> created it—a statute duly enacted pursuant to Art. I [§§] 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by [the Immigration and Nationality Act] involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always "ascertain whether the will of Congress has been obeyed," *Yakus v. United States*, 321 U.S. 414, 425, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944), and can enforce adherence to statutory standards. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S.Ct. 863, 865-866, 96 L.Ed. 1153 (1952); *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (CADC) (en banc) (separate statement of Leventhal, J.), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2662, 49 L.Ed.2d 394 (1976); L. Jaffe, Judicial Control of Administrative Action 320 (1965). *It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act.*

Chadha, 462 U.S 919, 953 n.16 (1983) (emphasis added). "Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits." *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 68 (D.C. Cir. 1976) (*en banc*) (Leventhal, J., concurring) (footnote omitted), *cert. denied*, 426 U.S. 941 (1976). An excessively broad waiver provision that does not require the Secretary to provide reasons, and whose invocation is not subject to judicial review, obfuscates any assessment of what the congressional will is, or whether it is being followed. Indeed, selective

waiver actions by the Secretary may allow the agency to make law in a way that bypasses Article I procedures.

Beyond ensuring basic fidelity to statutory commands that have complied with Article I, judicial review of agency action also helps guard against arbitrary use of discretion in implementing statutes. *See Clinton v. City of New York*, 524 U.S. 417, 489 (1998), (Breyer, J., dissenting). When Congress gives a broad grant of authority that could support a range of different agency decisions, and such legislative directive thus necessarily cannot provide fully sufficient guidelines, judicial review protects "the coherence and integrity of the legislative process." Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 656 (1985). Indeed, even the mere availability of judicial review plays this salutary role, as "the prospect of review increases the likelihood of fidelity to substantive and procedural norms." *Id.* Judicial review of discretionary agency action is especially important given agencies' lack of direct electoral accountability. *Cf. Clinton*, 524 U.S. at 490 (Breyer, J., dissenting) (distinguishing on this basis between the importance of judicial review of presidential discretion and review of agency discretion).

By contrast, the absence of judicial review has been a significant consideration on the occasions when this Court has found that statutes constitute unconstitutional delegations. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935). Indeed, delegations without judicial review have only been upheld when they have not raised serious separation of powers issues. *See, e.g., Heckler v.*

Chaney, 470 U.S. 821 (1985) (authority to the Food and Drug Administration to bring enforcement actions under the Food, Drug and Cosmetic Act); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958) (authority to Panama Canal Company to set Panama Canal tolls at a rate that covers costs of operating the canal). In cases raising non-delegation concerns the Court has taken pains to note both the existence of judicial review and, indeed, the adequacy of the particular judicial review provisions. *See, e.g.*, *Touby*, 500 U.S. at 168-169.

The petition for certiorari raises important questions, so far unanswered by the Court, about the necessity of judicial review to the constitutionality of exceptionally broad delegations of congressional power. Certainly, as described above, prior authority from this Court suggests the importance of judicial review as a predicate to the resolution of non-delegation claims. *See, e.g., Touby*, 500 U.S. at 168-79 & 170 (Marshall, J., concurring); *Skinner*, 490 U.S. at 218-19; *Chadha*, 462 U.S. at 953 n. 16; *Youngstown Sheet & Tube*, 343 U.S. at 585; *Yakus*, 321 U.S. at 425. In *Department of Interior v. South Dakota*, 519 U.S. 919 (1996), this Court vacated and remanded without need for argument a judgment of the Eighth Circuit, after the Solicitor General had effectively conceded that the agency's action was judicially reviewable. However, the dissenting opinion appears to raise doubts about the necessity of judicial review to a valid delegation of legislative power. 519 U.S. at 921-22 (Scalia, J., dissenting). The uncertainty on this fundamental issue has been noted by the lower courts. *See, e.g., United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc) ("it is not clear whether the nondelegation doctrine requires any form of judicial review"),

vacated on other grounds, 543 U.S. 1097 (2005). This uncertainty also has led to inconsistent results. *See, e.g.*, *United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992) (reversing district court's decision that that the Export Administration Act violated the non-delegation doctrine because of the lack of a provision for judicial review), *cert. denied*, 507 U.S. 917 (1993).

This case presents the question in the starkest possible way. Section 102(c) of the IIRIRA presents the Court with a nearly unprecedented delegation of authority to waive any "legal requirement[]" in the nation. That authority is unchecked by any judicial review of whether the administrative agency is making those waivers in compliance with congressional will and in a reasoned fashion. The Secretary has employed this discretion aggressively and without real explanation. The characteristics of the challenged statute and its implementation make it an ideal vehicle to resolve the question of whether the grant of such broad waiver power to an unelected official, without judicial review of his use of that power, is constitutional.

III. SECTION 102(c) RAISES PROFOUND QUESTIONS CONCERNING THE POWER OF CONGRESS TO DELEGATE ITS POWER TO NULLIFY A LAW

In addition to the unprecedented breadth of the power granted to the Homeland Security Secretary, Section 102(c) endows him with a core Article I power. U.S. Const. art. I, § 1. The waiver or limitation of a statute is a quintessentially legislative function. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437-441 (1992). The challenged legislative action in *Seattle Audubon Society*, "deeming" certain

statutory provisions to be satisfied if federal agencies took certain specified actions in connection with active litigation, partially suspended provisions of five statutes on which lawsuits had been brought. 503 U.S. at 434-36. The Court viewed the temporary modification of these environmental laws as legislative action within Congress's power. *Id.* at 437-41. The Court rejected contentions that the statute's unusual nature and, indeed, omnibus character (determining compliance with a number of statutes) meant that Congress had encroached on the powers of the judiciary. *Id.* Instead the Court looked beyond the unusual form of the law and the references to judicial action to the core reality that Congress was only modifying or temporarily superseding its own enactments. *Id.* ("We conclude that Subsection (b)(6)(A) compelled changes in law, not findings or results under old law").

Like the statute in *Seattle Audubon Society*, Section 102(c) authorizes the supersession, perhaps temporary, of statutes in a part of a country. "Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary . . . ." IIRIRA § 102(c)(1). Unlike the statute in *Seattle Audubon Society*, however, Section 102(c)'s power to temporarily nullify is to be exercised not by Congress, but by an unelected executive branch official. And unlike the statute in *Seattle Audubon Society*, this delegation of a uniquely Congressional power is made without limits as what statutes may be nullified, or even for how long.

On prior occasions Congress has granted authority to an agency to waive a legal provision upon the

happening of specified events, or upon the making of specified determinations. Section 102(c), however, is unprecedented in the breadth of its waiver. As the Congressional Research Service noted, Section 102(c) is not analogous to statutes that impose a rule of conduct but then authorize the agency to waive that rule under certain circumstances. Instead, Section 102(c)'s waiver authority is freewheeling, extending to any "legal requirement" in force. The breadth of Section 102(c)'s authority has already been remarked upon. But additionally troubling is that the Homeland Security Secretary's waiver authority is not linked to the original grant of power—*i.e.*, the original rules of conduct his agency is empowered to implement.

This decoupling raises the question of whether Section 102(c) is functionally indistinguishable from the omnibus nullifying authority that the Court struck down in *Clinton v. City of New York*, 524 U.S. 417 (1998). The *Clinton* Court was rightly concerned that what emerged from the President's exercise of his powers under the Line Item Veto Act—"truncated versions of two bills that passed both Houses of Congress"—were "not the product of the 'finely wrought' procedures that the Framers designed." 524 U.S. at 440. So too the waivers resulting from the Secretary's exercise of his Section 102(c) powers permit the executive to modify statutes in disregard of the "single, finely wrought and exhaustively considered, procedure" set forth in the Constitution to enact or modify statutes. *Chadha*, 462 U.S. at 951. That single constitutional procedure does not contemplate an unelected official in the executive branch performing the functional equivalent of partially repealing statutes. The repeal, even partial, of a legislative enactment is itself a uniquely legislative

act. *Chadha*, 462 U.S. at 954 (repeal of statutes, no less than enactment, must conform with Art. I).

It is, of course, no answer to contend that the Secretary's repeal power is only partial. For the geographic areas, the circumstances and the time frames decided upon by the Secretary, the target laws are a nullity. Just as it constituted a legislative act for Congress in *Seattle Audubon Society* to have deemed a variety of laws, as they applied to the Pacific Northwest forests, satisfied by the performance of certain specified actions, so too is it a legislative act to deem environmental, historical preservation, religious freedom and procedural laws without force in the "vicinity" of areas where border fences might be constructed.

At a minimum, Section 102(c) raises the question of whether the legislative perquisite of repealing and modifying statutory law can be delegated to an unelected executive branch official. The Secretary's actions to date pursuant to Section 102(c) directly frame this question for the Court. This case presents the Court with the opportunity to delineate whether such a delegation can ever be Constitutional and, if so, to demarcate the outer bounds of any such delegation.

* * *

"[L]iberty demands limits on the ability of any one branch to influence basic political decisions." *Clinton v. City of New York*, 524 U.S. 417, 450-51 (1998) (Kennedy, J., concurring). Quoting Montesquieu, the Federalist made the point as follows:

> "When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate

> should *enact* tyrannical laws to *execute* them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.'"

524 U.S. at 451 (quoting *The Federalist No. 47*, at 303 (James Madison) (Clinton Rossiter ed., 1961)) (emphasis in original).

A writ of certiorari should issue to determine whether Congress's standardless grant to the Homeland Security Secretary to make sweeping and unreviewable waivers of federal, state and local laws so raises the specter of arbitrary control and power that it violates the principles of separation of powers by unconstitutionally delegating legislative power to the Secretary of Homeland Security.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

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APPENDIX B

[LOGO]

Congressional Research Service

Memorandum February 9, 2005

SUBJECT: **Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders**

FROM: Stephen R. Viña and Todd B. Tatelman
Legislative Attorneys
American Law Division

Section 102 of H.R. 418, the REAL ID Act, captioned "Waiver of Laws Necessary for Improvement of Barriers at Borders," provides the Secretary of Homeland Security with authority to waive all laws he deems necessary for the expeditious construction of the barriers authorized to be constructed by § 102 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) (P.L. 104-208, Div. C, codified at 8 U.S.C. § 1103 note) and bars judicial review of such waiver decisions. This memorandum discusses the waiver provision in general; the extent to which Congress has passed laws that provide waivers comparable to §102 of H.R. 418; and the judicial review provisions. For background information on the border fence and § 102 of IIRIRA please refer to CRS Report RS 22026, *Border Security: Fences Along the U.S. International Border*.

H.R. 418, §102

Section 102 of H.R. 418 would amend § 102(c) of IIRIRA to read as follows:

> (c) Waiver—
>
> (1) IN GENERAL—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive, and shall waive, all laws such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.
>
> (2) NO JUDICIAL REVIEW—Notwithstanding any other provision of law (statutory or non-statutory), no court shall have jurisdiction—
>
> (A) to hear any cause or claim arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1); or
>
> (B) to order compensatory, declaratory, injunctive, equitable, or any other relief for damage alleged to arise from any such action or decision.

Waiver Provisions

If enacted, the new § 102 would provide the Secretary of Homeland Security with not only the authority to waive *all* laws he determines necessary to ensure the expeditious construction of the barriers and roads under § 102 of IIRIRA, but the *requirement* that the Secretary do so. This provision could provide the Secretary with broader waiver authority than what is currently in § 102(c) of IIRIRA. This authority would apparently include laws other than the

Endangered Species Act and the National Environmental Policy Act, but may not include a waiver of protections established in the Constitution.[1] All laws waived, however, must be determined by the Secretary to be necessary to ensure expeditious construction of the barriers and roads. The waiver authority provided by this amendment would also seem to apply to all the barriers that may be constructed under the authority of § 102 of IIRIRA—i.e., both to barriers constructed *in the vicinity of the border to deter illegal crossing in areas of high illegal entry*[2] and to the barrier that is to be constructed near the San Diego area.

Congress commonly waives preexisting laws, though the process necessary to complete the waiver and the number of laws waived vary considerably from provision to provision. Even more common is the use of the phrase, "notwithstanding any other provision of law." While the use of a broad "notwithstanding any

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[1] See discussion *infra*. During debate of a similar exemption provision for the border fence in the 108th Congress, supporters argued that labor and other non-environmental laws would not be considered as included in the phrase "any other laws." 151 Cong. Rec. H8899-H8901 (debate of amendment to H.R. 10). It is also not clear if state laws would be included in this waiver provision.

[2] There does not appear to be any statutory or regulatory definition for "high illegal entry." Note however, that over the last seven years 97% of all illegal alien apprehensions were made along the Southwest border. *See* CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*. Such a high percentage could be noted by those who might contend that the authority in § 102(a) of IIRIRA is more applicable, at least for now, to our Southwest borders; ultimately, however, it is the Secretary of DHS who determines places of "high illegal entry" under the section.

other provision of law" rarely settles the interpretive question, such directives seem facially preclusive, and some courts have determined that "notwithstanding" language may serve to explicitly preempt the application of other laws.[3] Other courts, however, have held that such provisions are generally not dispositive in determining the preemptive effect of a statute.[4]

After a review of federal law, primarily through electronic database searches and consultations with various CRS experts, we were unable to locate a waiver provision identical to that of §102 of H.R. 418—i.e., a provision that contains "notwithstanding language," provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws.[5] Much more common, it appears, are waiver provisions that (1) exempt an action from other requirements contained in the Act that authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar

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[3] *See e.g., Puerto Rico v. M/V Emily S.*, 132 F.3d 818 (1st Cir. 1997). In instances where "notwithstanding" language has been deemed controlling, courts sometimes buttress such decisions with an analysis of the underlying directives or legislative history of a statute. *See e.g., Illinois Nat'l Guard v. Federal Labor Relations Authority*, 854 F.2d 1396, 1402 (D.C. Cir. 1998).

[4] *See e.g., E.P. Paup v. Director, OWCP*, 999 F.2d 1341, 1348 (9th Cir. 1993); *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996).

[5] Our search did not include a review of annual appropriations language, which may include similar waiver provisions. It should be noted however, that as a general proposition, appropriations language is limited to the year of the appropriation, which may limit the application of any waiver.

laws. The most analogous provisions that we located appear to be, at least on their face, the following:[6]

- 43 U.S.C. § 1652(c): Allows the Secretary of the Interior and other Federal officers and agencies the authority to waive any procedural requirements of law or regulation which they deem desirable for authorizations that are necessary for or related to the construction, operation, and maintenance of the Trans-Alaska oil pipeline system (e.g., rights-of-way, permits, and leases).[7]
- 25 U.S.C. §3406: Allows the Secretaries of the Interior, Labor, Health and Human Services, and Education, notwithstanding any other law, to waive any statutory requirement, regulation, policy, or procedure promulgated by their agency that is identified by a tribal government as necessary to implement a submitted tribal plan under the Indian Employment, Training and Related Services Demonstration Act of 1992, as amended.
- 20 U.S.C. §7426: Provides almost identical waiver language to that of 25 U.S.C. §3406, but for plans submitted by tribal governments

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[6] Similarly, we found some provisions that exempt certain transactions or entities from all laws. *See e.g.,* 49 U.S.C. §11321 ("A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.").

[7] It is unclear how broadly a procedural requirement of law has been or could be interpreted.

for the integration of education and related services provided to Indian students.

There are also many other provisions that arguably grant broad waiver authority similar to that of § 102, but contain qualifications or reporting requirements that seem to limit their breadth.[8] Some of these waiver provisions grant the President or the head of an Executive agency the authority to waive a law[s] if deemed necessary in the *national interest* or in the interest of *national defense*. We cite here, some examples of this type of waiver authority:[9]

- 43 U.S.C. §2008: Allows the President to waive provisions of federal law he deems necessary in the national interest to facilitate the construction or operation of crude oil transportation systems or the Long Beach-Midland project. The President must submit his waiver to Congress, and Congress must pass a joint resolution before the President can take such actions under the waivers.
- 15 U.S.C. 2621: Allows the Administrator of the EPA to waive compliance with the Toxic Substances Control Act upon a request and determination by the President that the requested waiver is necessary in the interest of national defense.

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[8] Examples of waiver authority with a congressional notification element include: 15 U.S.C. §719f; 22 U.S.C. §2378; 22 U.S.C. §2371; and 41 U.S.C. §413. Other examples of broad yet somewhat more limited waiver authority include: 10 U.S.C. §433; 22 U.S.C. §3861; 25 U.S.C. §1680h; 48 U.S.C. §1469d; and 50 U.S.C. §198.

[9] Other waiver authority in the national interest include: 10 U.S.C. § 1107(a); 22 U.S.C. §2375(d); 29 U.S.C. §793; 42 U.S.C. §6212(b); 42 U.S.C. §6393(a)(2); 50 U.S.C. §2426(e).

- 10 U.S.C. §433: Allows the Secretary of Defense, in connection with a "commercial activity," to waive federal laws pertaining to the "management and administration of Federal agencies," if compliance would create an unacceptable risk to an authorized intelligence activity. This provision further requires that the waiver be in writing and specifically describes the types of activities that pertain to the "management and administration of federal agencies," though it does not specify the actual laws.

As mentioned above and as the examples we have set forth arguably demonstrate, the breadth of waiver authority granted by § 102 of H.R. 418 does not appear to be common in the federal law searched.

Judicial Review Provisions

By including the language "no court," §102(c)(2) of H.R. 418 appears to preclude judicial review of a Secretary's decision to waive provisions of law by both federal and *state* courts. It is generally accepted that Article III of the United States Constitution grants Congress the authority to regulate the jurisdiction, procedures, and remedies available in federal courts.[10] However, what remains uncertain is whether Congress's authority, pursuant to Article III, extends to the jurisdiction, procedures, and remedies of state courts. In addition, it remains uncertain to what extent Congress has Article III authority to prevent courts, state or federal, from addressing and

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[10] Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. Article III.

remedying issues arising under the United States Constitution.

With respect to Congress's ability to control the jurisdiction of state courts, the Supreme Court has ruled that subject to a congressional provision to the contrary, state courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in Article III, except for suits between States, suits in which either the United States or a foreign state is a party, and those considered within the traditional jurisdiction of admiralty law.[11] Thus, it appears possible to argue that Congress has a plenary power to allocate jurisdiction between the state and federal courts. In other words, if, for example, Congress can make jurisdiction over an area of law exclusively federal,[12] thereby depriving state courts of any ability to hear the claim, it appears that Congress may also be able to remove a cause of action

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[11] *See* 28 U.S.C. §§ 1251, 1331 *et seq.* (2004). In fact, the presumption is that state courts enjoy concurrent jurisdiction, and Congress must explicitly or implicitly confine jurisdiction to the federal courts to oust the state courts. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-84 (1981); *see also Tafflin v. Levitt*, 493 U.S. 455 (1990); *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990). For example, Justice Scalia has argued that, insomuch as state courts have jurisdiction generally because federal law *is* law for them, Congress can provide exclusive federal jurisdiction only by explicit and affirmative statement in the text of the statute, but as can be seen that is not now the rule. *See Tafflin v. Levitt*, 493 U.S. 455, 469 (1990).

[12] Perhaps the best example of an area of law that Congress has made exclusively federal is immigration. Federal Courts, however, also appear to have exclusive jurisdiction over the federal antitrust laws, despite the fact that Congress has never spoken either expressly or implicitly. *See General Investment Co. v. Lake Shore & Michigan Southern R.R. Co.*, 260 U.S. 261, 287 (1922).

from state courts without concurrently granting jurisdiction to the federal courts.

State courts, however, are often considered to be independent and autonomous from the federal court system. This independent status has led some scholars to argue that because the Constitution appears to reserve to the states the authority to control the jurisdiction of their own courts, Congress's "only means of allocating jurisdiction is through control of the federal court's jurisdiction."[13] The argument that state courts are autonomous can be derived, in part, from the Supreme Court's doctrine with respect to its ability to review decisions from state courts. While the Court has the authority to review a decision of a state's highest court, it has repeatedly held that it will not do so if the decision rests upon adequate and independent state grounds.[14] This rule is arguably designed to protect a state's interest in developing and applying its own laws. Thus, it would appear that an argument can be made that Congress does not possess the authority to regulate the jurisdiction of state courts directly. It may be the case, however, that Congress's ability to control the jurisdiction of the federal courts indirectly affects and alters the

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[13] Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1080 (1992) (*citing Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990); *Gulf Oil Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); Henry M. Hart Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

[14] *See Colman v. Thompson*, 501 U.S. 722, 729 (1991) (stating that the Court will not review a state court decision "if the decision of the court rests on a state law ground that is independent of the federal question and adequate to support judgment").

jurisdiction of the state courts, which would appear to preserve their autonomous status.[15]

Turning to Congress's ability to remove jurisdiction with respect to claims arising under the Constitution, it appears that Supreme Court precedent requires that at least some forum be provided for the redress of constitutional rights.[16] While it appears that the Supreme Court has not directly addressed whether there needs to be a judicial forum to vindicate all constitutional rights, it appears that the Court has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues, as well as construction of statutes that purport to limit the Court's jurisdiction.[17] At least one justice, however, has indicated that there have been particular cases, such as political question cases, where all constitutional review is in effect precluded.[18]

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[15] It should be noted, however, that a court may interpret this provision to be preclusive, which would appear to avoid any constitutional issues.

[16] *See Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). For a much more complete discussion of this issue, *see* CRS Report RL31271, *Limiting Court Jurisdiction Over Federal Constitutional Issues: "Court-Stripping,"* by Kenneth R. Thomas, Jan. 24, 2005.

[17] *See Johnson v. Robinson*, 415 U.S. 361, 366-67 (1974); *see also Weniberger v. Salfi*, 422 U.S. 749, 762 (1975); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 664, 681 n. 12 (1988); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Felker v Turpin*, 518 U.S. 651, 660-61 (1996); *INS v. St. Cyr*, 533 U.S. 289, 298, 314 (2001).

[18] *See Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (Scalia, J., dissenting) ("Even apart from the strict text of the Constitution, we have found some constitutional claims to be beyond judicial

Nevertheless, the Court has generally found a requirement that effective judicial remedies be present. For example, in cases involving particular rights, such as the availability of effective remedies for Fifth Amendment takings, the Court has held that "the compensation remedy is required by the Constitution."[19] In addition, lower federal courts appear to have held that, in most cases, some forum must be provided for the vindication of constitutional rights.[20] Cases such as these would seem to provide a basis for the Court to find that parties seeking to vindicate other particular rights must have a judicial forum for such challenges; therefore, the Court may construe the provisions of H.R. 418 in a manner that preserves this right.

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review because they involve "political questions." . . . In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.").

[19] *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 (1987) (*citing Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984); *United States v. Causby*, 328 U.S. 256, 267 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306 (1923); *Monongahela Navigation v. United States*, 148 U.S. 312, 327 (1893)).

[20] *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d. Cir. 1948) (stating that "while Congress has the undoubted power to give, withhold, or restrict the jurisdiction of courts other than the Supreme Court, it must not exercise that power as to deprive any person of life, liberty, or property without due process or just compensation . . . ."). In addition, other judicial decisions point to the doctrine of sovereign immunity and the ability of the government to limit the remedies available to plaintiffs. *See Bartlett v. Bowen*, 816 F.2d 695, 719-720 (1987) (Bork, J., dissenting).

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No. 07-1180

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In the Supreme Court of the United States

DEFENDERS OF WILDLIFE AND SIERRA CLUB,
Petitioners,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondent.

On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia

BRIEF OF FOURTEEN MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FOURTEEN MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are House Committee Chairpersons, Members of the Committee on Homeland Security, and Members representing districts in states that border Mexico. They are Homeland Security Committee Chairman Bennie G. Thompson, Energy & Commerce Committee Chairman John D. Dingell, Transportation & Infrastructure Committee Chairman James L. Oberstar, Education and Labor Committee Chairman George Miller, Rules Committee Chairwoman Louise Slaughter, Veteran Affairs Chairman Bob Filner, Intelligence Committee Chairman Silvestre Reyes, Congressman Solomon Ortiz of Texas, Congressman Sam Farr of California, Congresswoman Sheila Jackson-Lee of California, Congresswoman Susan A. Davis of California, Congresswoman Hilda Solis of California, Congressman Raul M. Grijalva of Arizona, and Congresswoman Yvette D. Clarke of New York.

The *amici* Committee Chairs believe that the waiver granted by Secretary Chertoff that is the subject of this litigation is a direct affront to the institution of Con-

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[1] Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* state that timely notice of intent to file the brief was given to and received by all counsel of record. The parties' letters of consent to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

gress. In their view, the Secretary's use of the waiver authority under Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended by the REAL ID Act of 2005, greatly undermines – and manifests an utter lack of respect for – the many laws that the *amici curiae* (and members of prior Congresses) have drafted, debated and defended, and that have been enacted by the House of Representatives and Senate and signed by the President.

The *amici* Members of the Committee on Homeland Security are concerned that Secretary Chertoff, in granting the waiver that is the subject of the current litigation (as well as three other waivers he has granted pursuant to Section 102), is abusing his authority and disregarding both congressional intent and constitutional restrictions on Executive Branch power.

The *amici* Members who represent districts in states that border Mexico have a keen interest in seeing laws be executed prudently, in a manner that respects the statutes and regulations that have protected their communities for decades. These Members are also particularly well situated to appreciate the important competing policies reflected in the Secure Fence Act, the REAL ID Act, and the dozens of laws critical to protecting the residents, environment, and historical and cultural sites in the border region.

Finally, *amici* are uniquely situated to apprise the Court of the importance of the issues presented here to the proper exercise of their constitutionally defined legislative responsibilities. Members of the U.S. Congress often make their views known to this Court in cases that raise issues concerning the preservation of

the constitutional balance of powers among the co-equal Branches of Government.[2] This is such a case.

STATEMENT

The petition for certiorari presents two significant, closely related questions concerning the fundamental limits on Congress's exercise of legislative power under Article I of the Constitution – an area of law that this Court has not addressed since 2001. See *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457 (2001). No doubt because of the extraordinary nature of the waiver provision challenged in this litigation, this Court has never had occasion to address the precise constitutional issues raised in this case. The ultimate resolution of those weighty questions – whether by the Court's exercise of further review or by its decision to leave in place the opinion of a single district judge as the final word concerning Congress's Article I authority – has the potential to fundamentally redefine the way federal laws are made and enforced. As Congress has eliminated intermediate appellate review of all issues, including the constitutional ones presented in this case, the only opportunity for a second look is through the certiorari process in this Court. For the reasons set forth in the petition for certiorari and below, the Court should grant review to resolve the important constitutional issues presented, to provide greater guidance concerning the meaning of Article I and the non-delega-

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[2] See, *e.g.*, Brief for Representatives Henry A. Waxman, David E. Skaggs, and Louise M. Slaughter as *Amici Curiae* in Support of Appellees, *Clinton* v. *City of New York*, No. 97-1374 (filed Apr. 3, 1998) (urging the result ultimately reached by the Court that the line-item veto was unconstitutional).

tion doctrine in this setting, and to correct the district court's flawed decision.

1. At issue in this case is the constitutionality of a statutory waiver provision that was enacted as a rider to an unrelated emergency wartime appropriations bill. See Pub. L. No. 109-13, 119 Stat. 231, § 102, *codified at* 8 U.S.C. § 1103 note ("Section 102"). Section 102 broadly confers on the Secretary of the Department of Homeland Security (DHS) "the authority to waive *all legal requirements* such Secretary, *in such Secretary's sole discretion*, determines necessary to ensure expeditious construction of the barriers and roads under this section." *Ibid.* (emphasis added). The term "all legal requirements" is sweeping and presumably includes all forms of state and local law, including state constitutions, statutes, regulations, rules, and common law. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1007-09 (2008). It also includes all forms of federal law, including treaties, statutes, interstate compacts, regulations, court rules, and federal common law – except, of course, for legal requirements imposed by the U.S. Constitution.

In addition to granting the waiver authority, Section 102 contains the following stringent limitations on judicial review:

> (2) FEDERAL COURT REVIEW. –
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> (A) IN GENERAL. – The district courts of the United States shall have *exclusive jurisdiction* to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A

> cause of action or claim *may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.*
>
> (B) TIME FOR FILING OF COMPLAINT. – Any cause or claim brought pursuant to subparagraph (A) *shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security.* A claim shall be barred unless it is filed within the time specified.
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> (C) ABILITY TO SEEK APPELLATE REVIEW. – An interlocutory or final judgment, decree, or order of the district court *may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.*

Ibid. (emphasis added). Thus, the statute categorically bars all litigation challenging Section 102 in the state courts; categorically bars all litigation raising challenges to the Secretary's compliance with Section 102's substantive requirements (including the requirement that the Secretary's waiver be "necessary to ensure expeditious construction of the barriers and roads under this section"); bars appellate review by the United States Courts of Appeals of the federal district court's rulings on the constitutionality of Section 102 (thus ensuring that intercircuit conflicts – a major reason why this Court exercises its certiorari jurisdiction – will never develop); and strips this Court of mandamus jurisdiction and limits its review to the certiorari process. Moreover, Section 102 includes extremely short time limits – such as the 60-day filing limit – that may have the effect of insulating certain

federal constitutional claims from judicial review. This includes, for example, takings claims that do not become ripe within 60 days of the Secretary's waiver decision.

During the drastically foreshortened floor debate on Section 102, one of the undersigned *amici curiae* observed:

> To my knowledge, a waiver this broad is unprecedented. It would waive all laws, including laws protecting civil rights; laws protecting the health and safety of workers; laws, such as the Davis-Bacon Act, which are intended to ensure that construction workers on federally-funded projects are paid the prevailing wage; environmental laws; and laws respecting sacred burial grounds. It is so broad that it would not just apply to the San Diego border fence that is the underlying reason for this provision. It would apply to any other barrier or fence that may come about in the future.

151 Cong. Rec. H459, 109th Cong., 1st Sess. (daily ed. Feb. 9, 2005) (statement of U.S. Representative Jackson-Lee). A report by the nonpartisan Congressional Research Service on the use of waivers and regulation of judicial review in legislation confirmed the truth of Ms. Jackson-Lee's observation that Section 102 is "unprecedented." See Stephen R. Viña & Todd B. Tatelman, *Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Cong. Res. Serv. (Feb. 9, 2005), at 2 (reaching that conclusion based on"a review of federal law, primarily through electronic database searches and consultations with various CRS experts"); see also 151 Cong. Rec. H554

(daily ed. Feb. 10, 2005) (statement of U.S. Representative Farr) ("Mr. Chairman, it has never been done before, waiving all labor laws, all contract laws, all small business laws, all laws relating to sacred places. It is a broad sweep, just a total repeal of all of those laws or a waiver of all those laws.").

2. This litigation arose after the Bureau of Land Management (BLM) granted a permanent right-of-way to DHS to permit it to build a fence across biologically and environmentally sensitive areas along the border between the United States and Mexico. Pet. App. 1a-2a. Defenders of Wildlife and the Sierra Club (petitioners in this Court) sued seeking preliminary and permanent injunctive relief and moved for a temporary restraining order. The district judge recognized that petitioners were likely to succeed in their challenge to BLM's decision to grant the right-of-way without fully complying with the National Environmental Policy Act (NEPA), and that BLM's decision presented a danger of harm to the public interest. It accordingly issued a temporary restraining order. Pet. App. 3a.

On October 10, 2007, the district court accordingly ordered DHS to cease building the border fence without first preparing a full Environmental Impact Statement, as required by NEPA.[3] See Pet. App. 3a. Secretary

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[3] Since 1970, NEPA has "declare[d] a national policy" seeking to encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.

Chertoff responded swiftly to the federal court's order. On October 26, 2007, he unilaterally concluded that the goal of constructing a fence along the border between Arizona and Mexico outweighed the policies contained in 19 different federal statutes, including the Administrative Procedure Act. See Pet. App. 5a n.4 (citing 72 Fed. Reg. 60,870). That waiver decision was reached without any public-record consultation with Congress or any of the expert federal agencies that administer the federal laws being waived, including the Environmental Protection Agency, the Department of the Interior, the Department of Agriculture, the Fish and Wildlife Service, or the Council on Environmental Quality.

"I determine," the Secretary further proclaimed in granting the waiver,

> that * * * the lands covered by the Temporary Restraining Order (TRO) signed by Judge Ellen S. Huvelle on October 10, 2007, in the case of Defenders of Wildlife et al. v. Bureau of Land Management * * * is an area of high illegal entry.

72 Fed. Reg. 60,870. Respondent Chertoff went on to conclude that "it is necessary" to "waive in their entirety" 19 federal statutes in order to complete fence construction.[4] Of the 19 statutes waived, only two –

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42 U.S.C. § 4321. Congress and the President chose to implement that policy by requiring, for all "major Federal actions," a "detailed statement" describing, among other things, "environmental impact[s]" and "alternatives" to the action to be taken. *Id.* § 4332(C).

[4] See Pet. 7 & n.3 (listing the 19 waived statutes).

NEPA and the Arizona-Idaho Conservation Act, Pub. L. No. 100-696, 102 Stat. 4571, *codified at* 16 U.S.C. § 460xx to 460xx-6 – were raised in the original lawsuit in the district court. See Pet. App. 3a.

Many of the "waived" statutes are pillars of U.S. environmental and historical and cultural preservation policy. Every one of the waived statutes was passed by both houses of Congress and signed into law by the President. Thus, each is the product of the "'single, finely wrought and exhaustively considered, procedure'" prescribed by the Constitution for enacting statutes. *Clinton* v. *City of New York*, 524 U.S. 417, 439-40 (1998) (quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)).

The October 26 waiver at issue in this case was the third waiver granted by Secretary Chertoff under Section 102. It was also the broadest that had been granted as of that date. The first was a September 22, 2005, waiver of seven environmental and historic preservation laws plus the Administrative Procedure Act, applicable to 14 miles of fence being constructed in the vicinity of San Diego. See 70 Fed. Reg. 55,622. The second was a January 19, 2007, waiver of eight laws plus the Administrative Procedure Act, in connection with fence construction in the Barry M. Goldwater Range. See 72 Fed. Reg. 2,535.[5] With each waiver the Secretary ominously "reserve[d] the authority to make further waivers from time to time under the authority granted to me by section 102(c) of the IIRIRA, as

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[5] The Goldwater range is an Air Force and Marine armament testing facility in southwestern Arizona. See http://www.luke.af.mil/library/factsheets/factsheet.asp?id=5062.

amended by section 102 of the REAL ID Act, as I may determine to be necessary to accomplish the provisions of section 102 of IIRIRA." 72 Fed. Reg. 60,870. Thus, the Secretary from the very beginning interpreted his delegated authority much more broadly even than the stated intent of the sponsors of Section 102, which was to expedite construction of the portion of the border fence in the San Diego area. See 151 Cong. Rec. H554 (daily ed. Feb. 10, 2005) (statement of U.S. Representative Sensenbrenner) (discussing the need to finish "plugging the hole in the fence south of San Diego").

3. After the petition for certiorari was filed in this case, the Secretary granted two waivers on April 3, 2008. These latest waivers together cover vast stretches of the U.S.-Mexico border in California, Arizona, New Mexico and Texas. See 73 Fed. Reg. 19,077 (as amended Apr. 8, 2008) (Hidalgo County, Texas); 73 Fed. Reg. 19,078 (as amended Apr. 8, 2008) (California, Arizona, New Mexico and Texas). They seem designed to test the Court's tolerance of the Secretary's far-reaching waiver authority. The broader of the two April 3 waivers defeats application of *35 statutes* (*including* the Administrative Procedure Act) (73 Fed. Reg. at 19,080). The Secretary's determination "that it is necessary that I exercise the authority that is vested in me" to waive those numerous statutes has the effect of subordinating more than a century's worth of legislation (the oldest waived statute is the Rivers and Harbors Act of 1899, 33 U.S.C. § 403) to the uni-

tary, and politically contentious, policy of building a border fence.[6]

SUMMARY OF ARGUMENT

Certiorari is warranted in this case for two distinct reasons. First, the questions raised in the petition present such a danger of confusion on matters of utmost constitutional significance that, even in ordinary circumstances, they would be deserving of this Court's attention. Second, the statutory provision at issue in this case contains restrictions on judicial review that are anything but ordinary. Because the statute eliminates intermediate appellate review of the important constitutional questions raised by the petition, the final word on those questions will be that of a single district judge unless this Court grants the petition for certiorari.

Guidance is needed concerning the permissible scope of congressional delegations of waiver authority to the Executive Branch that are subject to only limited judicial review. Delegations of waiver authority are a useful legislative tool that Congress has employed to assist in efficient and effective governance. But such delegations also present dangers of violating the Article I scheme for law-making, which operates to ensure a structural check on the concentration of power in one Branch of Government. Congress looks to this Court's

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[6] It is doubtful that the Secretary's waiver decisions would pass muster if they were reviewed for compliance with the statutory waiver standard. Notably, the waivers uniformly have been much broader than any actual challenges to DHS's actions have been. See pages 8-10, *supra*.

authoritative guidance in carrying out Congress's responsibility of complying with Article I. Because the broad waiver authority, elimination of judicial review of compliance with the statutory standard, and severe curtailment of appellate review of constitutional issues in Section 102 are unique, the only directly on-point authority – unless this Court intervenes – is the district court opinion below.

And that opinion, which again is not subject to intermediate appellate review, is wrong. Section 102 cannot be squared with this Court's non-delegation and separation-of-powers jurisprudence. Combining the features of a sweeping delegated waiver provision with an elimination of judicial review of statutory compliance (and a severe restriction on review even for constitutionality), Section 102 places in the hands of an unelected Executive Branch official the power to undo the work of Congress, without any commensurate obligation to justify, or defend, that decision. That transgresses the procedure set forth in Article I for making law. It also undermines the "intelligible principle" requirement for legislative delegations of authority. The Court should grant the petition for certiorari.

ARGUMENT

The Fundamental Constitutional Issues Raised In This Case Should Be Answered By This Court Rather Than By A Single District Judge

The issues presented by the petition for certiorari have been examined only by a single Article III judge, even though they raise fundamental questions concerning the manner in which laws are passed and executed.

There is no possibility of further review by any court except this one. That remarkable circumstance merits the granting of the petition, which in any event clearly raises "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." S. Ct. R. 10(c).

Statutory provisions authorizing administrative waivers of statutory requirements or imposing procedural regulations of judicial review – such as requiring suit to be brought in a particular venue, or limiting appellate review to a particular circuit court – can be legitimate tools of responsible governance, when used in moderation. But waiver authority granted by statute ordinarily is quite limited in scope and is often vested in an expert administrative agency that is charged with administering the underlying statute that can be waived. Here, in contrast, Section 102 of the REAL ID Act grants to Secretary Chertoff far-reaching power to waive an *unlimited* set of federal statutes, treatise, regulations, and court rules which he has *no* role in administering and as to which he has no expertise whatsoever. It does not require the Secretary even to *consult* the agencies that have the relevant expertise or authority to administer the statute. Section 102 also grants him sweeping authority to waive state laws in all of their myriad forms. Moreover, as the decision below illustrates, the line between permissible uses of administrative waiver provisions and procedural regulations concerning the scope and manner of judicial review, and constitutionally impermissible waiver provisions and the elimination of judicial review, is poorly understood. This case is a perfect vehicle for the Court to offer much-needed guidance on this fundamen-

tal constitutional question to the co-equal Branches of Federal Government.

Certiorari is also warranted for another reason. Section 102 of the REAL ID Act is deeply problematic. In addition to its grant of unprecedented waiver authority, Section 102 eliminates any form of review of a waiver decision for statutory compliance. Thus, nothing prevents respondent from granting a waiver without ever explaining why it is "necessary to ensure expeditious construction of the barriers and roads under this section." Indeed, nothing prevents Secretary Chertoff from granting a waiver when no such necessity actually exists. He is entirely free to flout the will of Congress, or even to "interpret" away Section 102's substantive requirements by suggesting that "necessary" means "convenient" or "expedient" – and Congress has provided that *no court*, state or federal, *including this Court*, can do anything about that.

The glaring flaws in Section 102 are, in *amici*'s view, structural and irremediable. The harm caused – the subordination of republican principles written into Articles I and II of the U.S. Constitution – is inherent in the violation. "Liberty is always at stake when one or more of the Branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring). Unless this Court grants the petition, that harm will go unremedied. Secretary Chertoff's most recent waiver decisions demonstrate that the harm will be compounded unless this Court intervenes now.

A. Guidance Is Needed Concerning The Permissible Scope Of Congressional Delegations Of Waiver Authority To The Executive Branch That Are Subject To Only Limited Judicial Review

Congress has an independent duty to evaluate the constitutionality of its own enactments. But Congress legislates with an eye toward this Court's definitive and binding interpretation of constitutional standards. Where confusion exists and this Court nonetheless stays its hand, Congress must legislate against the backdrop of that uncertainty. The result is legislation like Section 102, which presents serious constitutional difficulties.

1. Waiver provisions and reasonable procedural regulations of the scope and manner of judicial review are important arrows in the legislator's quiver. As this Court has recognized, executive waivers of statutory requirements have been used many times in the history of the Republic. See *Clinton*, 524 U.S. at 444-45 (1998) (citing statutes and interpreting decisions).[7] The ubiquity and importance of these tools in the legislative process, and the need for their continued use in the future, underscores the importance of this Court's review in this case. *Cf. Chadha*, 462 U.S. at 944 ("our inquiry is sharpened rather than blunted by the fact

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[7] See also Pet. App. 10a n.5 (listing examples); Stephen R. Viña & Todd B. Tatelman, *Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Cong. Res. Serv. (Feb. 9, 2005), at 4-5 & nn.8-9 (listing examples).

that Congressional veto provisions are appearing with increasing frequency in statutes").

For example, waivers of NEPA's environmental review requirements are commonplace in the context of federal disaster relief efforts under provisions of the Stafford Act. See Pub. L. No. 93-288, 88 Stat. 143, as amended, *codified at* 42 U.S.C. §§ 5121-5206. By exercising a power granted in one of the listed Stafford Act provisions, the Executive Branch effects a waiver of NEPA's requirements. See, *e.g.*, 71 Fed. Reg. 14712-03 (Mar. 23, 2006) (employing "alternative arrangements" to comply with NEPA in rehabilitating critical infrastructure and observing that certain rehabilitation activities are exempted from NEPA under the Stafford Act).

Recent examples of appropriate application of the Stafford Act exemptions occurred in the context of relief efforts following Hurricanes Katrina and Rita in 2005 and 2006, respectively. See 42 U.S.C. §§ 5159 (exempting from NEPA federal actions authorized elsewhere in the statute), 5170a (authorizing President to provide federal assistance in support of state or local response efforts), 5170b (same for assistance in response to immediate threats to life and property), 5172 (authorizing President to contribute to restoration of public or certain private non-profit facilities), 5173 (authorizing President to assist in debris removal), 5192 (authorizing general federal emergency assistance to state and local governments).

Waivers such as those employed in the wake of natural disasters are without question essential tools of effective governance in emergency circumstances.

Congress will undoubtedly continue to include them in legislation with the expectation that the Executive Branch will employ them prudently. The Stafford Act reflects an appropriately restricted congressional delegation of its power to Executive Branch officials who possess the relevant expertise to make the decisions in question. Thus, for example, Section 5170a applies only "[i]n a[] major disaster" (§ 5170a); is limited to efforts to restore a facility to its pre-disaster condition (§ 5159); and applies only to an enumerated list of specified activities (§ 5170a(1)-(5)). Section 5170b has a similar structure and similarly limits the waiver authority. And sections 5172, 5173 and 5192 also carefully limit the circumstances in which NEPA waivers are permitted.[8]

Section 102, by contrast, permits a single official in the Executive Branch to waive application of every imaginable federal statute, from environmental protection to child labor laws to transportation safety.[9]

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[8] Waivers under the Stafford Act are subject to judicial review under the Administrative Procedure Act. See *Hayne Blvd. Camps Preservation Ass'n* v. *Julich*, 143 F. Supp. 2d 628, 633 (E.D. La. 2001) (citing 5 U.S.C. § 706).

[9] Two *amici* raised this precise issue during floor debate on the statute and related amendments. Representative Dingell pointed out that the bill

> would give power to the Secretary of Homeland Security to waive any public health law such as the Safe Drinking Water Act, the Clean Water Act, as well as transportation safety, hazardous materials transportation and road construction standards. In addition, it would grant DHS unchecked authority to abrogate criminal law, child labor laws, laws that protect workers, civil rights laws, ethics laws for clean

Exactly where to draw the line between a waiver provision like that in the Stafford Act – which *amici* believe restricts Executive Branch discretion sufficiently to meet the constitutional standards for delegated authority and separation of powers – and an unconstitutional waiver provision is not entirely clear under this Court's decisions. Further guidance from this Court is needed.

2. The district court's treatment of Section 102 also creates confusion regarding the appropriate legislative use of procedural regulations of the scope and manner of judicial review. Like waiver provisions, such procedural regulations of judicial review of agency actions are ubiquitous and important tools for efficient and effective governance.

A recent example is a procedural regulation of judicial review in Section 934 of the Energy Independence & Security Act of 2007, Pub. L. No. 110-140, 121

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contracting and procurement policy.

151 Cong. Rec. H561 (daily ed. Feb. 10, 2005) (remarks of Rep. Dingell). And Representative Oberstar warned that

> the Department of Homeland Security could select a contractor without competitive bidding, use undocumented workers, violate child labor laws, pay the workers less than the minimum wage, exempt contractors from Federal and State withholding; workers could be forced to put in 18-hour-days without overtime pay, in unsafe conditions, and be transported in trucks used for hazardous cargo; and * * * the Secretary [would have] discretion to have these workers construct fences and roads through private property.

151 Cong. Rec. H556 (daily ed. Feb. 10, 2005) (remarks of Rep. Oberstar).

Stat. 1492 (Dec. 19, 2007), *codified at* 42 U.S.C. § 17373. That provision requires that all appeals from claims arising under the 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage must be taken to the United States Court of Appeals for the D.C. Circuit. § 17373(i)(1). Similarly, the Carbon-Neutral Government Act of 2007, H.R. 2635, 110th Cong., 1st Sess., a bill sponsored by Chairman Waxman of the House Committee on Oversight and Government Reform, includes a provision (Section 212) that regulates judicial review. It regulates total liabilities that may be imposed, the courts (federal only) that may hear claims of a violation, and the proper venue for petitions for review of agency action (restricting such review to the D.C. Circuit). Appeals in patent cases, including challenges to Patent and Trademark Office actions, have been available exclusively in the Federal Circuit for decades. See 28 U.S.C. § 1295(a)(4)(C); 35 U.S.C. § 141.

Those examples, of course, are nothing like the complete *elimination* of judicial review of the Secretary's action for compliance with Section 102 itself, or the *elimination* of all appellate review in the U.S. Courts of Appeals of even constitutional claims brought challenging Section 102. See pages 4-6, 17 n.9, *supra*.

There can be no doubt that the much more stringent limits on judicial review of Section 102 might appear expedient, especially when the decision to be reviewed is – like the Secretary's waiver at issue in this case – politically polarizing. But this Court has stated repeatedly that "Executive action under legislatively

delegated authority that might resemble 'legislative' action in some respects is * * * always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review." *Chadha*, 462 U.S. at 953 n.16. Congress legislates with this critical limitation in mind. If left undisturbed, the district court's approval of Section 102's functional elimination of judicial review will undermine that understanding.

B. Section 102 Cannot Be Reconciled With This Court's Non-Delegation and Separation-of-Powers Jurisprudence

This Court's separation-of-powers and non-delegation jurisprudence of recent decades teaches two important lessons. First, legislation, including statutory repeals, may come into existence only through the procedures specified in Article I of the Constitution. *Clinton*, 524 U.S. at 439-40. Second, concentration of power in one branch of government to a degree beyond that contemplated by the Constitution presents intolerable risks of harm to individual liberty. *Chadha*, 462 U.S. at 950-51. The decision below disregards both of these crucial teachings.

1. *Chadha* held unconstitutional a provision of the Immigration and Nationality Act that allowed the House to disapprove a determination of non-deportability by the Attorney General (the Executive Branch official charged with administering the Immigration and Nationality Act). See 462 U.S. at 958-59. The risk the Court sought to avoid was the subordination of the protections provided by the constitutional requirements for legislation (with all their "cumbersomeness and

delays") to "convenient shortcut[s]." *Id.* at 958. If that statute was interpreted to amount to amendment or repeal of the existing provision of the act, it still violated Article I, because "[a]mendment and repeal of statutes, no less than enactment, must conform with Art. I." 462 U.S. at 954.

Chadha dealt specifically with Congress encroaching on Executive Branch prerogatives through a violation of the Presentment Clause of Article I. But it cannot be disputed that abuse of Executive Branch authority – like that at issue in this case – was a primary concern of the framers of our Constitution, then only recently freed from rule by the British Crown. The 56 signatories to the Declaration of Independence agreed that "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." U.S. Decl. of Indep.; see also *Metro. Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 273 (1991) ("The abuses by the monarch recounted in the Declaration of Independence provide dramatic evidence of the threat to liberty posed by a too powerful executive."). These concerns about overreaching by the executive were echoed in other founding-era documents. See, *e.g.*, The Federalist No. 47 (Madison) at 324-26 (Jacob E. Cooke, ed., 1961) (quoted in *Chadha* v. *INS*, 634 F.2d 408, 421 n.12 (9th Cir. 1980) (Kennedy, J.)).

The legislation at issue in *Clinton* gave to the President the legislative power to repeal portions of congressional enactments. See 524 U.S. at 438 ("In

both practical and legal effect, the President has amended two Acts of Congress by repealing a portion of each."). As with the legislative veto in *Chadha*, the concern in *Clinton* for Executive Branch encroachment on the legislative function also raised substantial constitutional issues. See *id.* at 450 (Kennedy, J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."). This case, like *Clinton*, presents the concern for Executive Branch overreaching. And in that regard, as petitioners have persuasively shown (Pet. 19-24), the unconstitutional line item veto act seemingly is indistinguishable in practical effect from the waiver provision of Section 102. Compare *Clinton*, 524 U.S. at 436 (describing the line-item-veto act) with Pet. App. 3a-4a (describing the waiver provision of Section 102).

2. The non-delegation inquiry is a specific application of the separation-of-powers analysis. It operates to ensure that the granting of authority by Congress to another branch of government does not amount to an impermissible delegation of legislative power. See *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928) ("it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch"). The "intelligible principle" standard that this Court announced as early as 1928, in *J.W. Hampton*, and repeated recently in *American Trucking Associations*, 531 U.S. at 474, serves two vital purposes. It ensures effective judicial review of a delegated function for compliance with the statutory criteria. It also ensures political accountability.

The court below concentrated on the principle advanced in Section 102 – "necessary to ensure expeditious construction of the barriers and roads under this section" – and concluded that it was a sufficient "intelligible principle" under this Court's precedents to render the delegation permissible. Pet. App. 15a. That ruling ignored a key component of the intelligible principle standard: the availability of judicial review of compliance with the constraining principle set forth in the statute. Without such review, the Secretary's decision "in such Secretary's sole discretion" has the force of law. Nothing would permit a court to "'ascertain whether the will of Congress has been obeyed.'" *Touby* v. *United States*, 500 U.S. 160, 168-69 (1991) (internal quotation omitted). The critical question under this Court's precedents, then, is not merely whether the statute provides an "intelligible principle." It is whether the exercise of delegated authority is functionally reviewable for compliance with the statutory standard. Section 102 crosses the line between a reasonable procedural regulation, and an impermissible elimination, of judicial review.

The district court also ignored the second rationale behind the "intelligible principle" standard. An excessively broad delegation is an exercise in passing the proverbial buck. It gives to an administrative official, who is not answerable for his decisions to the electorate, the authority to make the difficult political decisions Congress and the President might wish to avoid. The waivers implemented by Secretary Chertoff in this case (and his other waivers) are actions that might be politically problematic to achieve through the Article I legislative process. But "[f]ailure of political

will does not justify unconstitutional remedies." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring).

To be sure, political expedience is not the only possible justification for delegated authority. Delegation can also be efficient. The broad waiver in Section 102 allows Congress to avoid hearings, debates, and fact-finding on the "necessity" to waive application of 35 federal statutes. But the efficiency rationale no more supports an unconstitutional delegation than does the failure of political will. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S. at 944.

The questions presented by the petition are of such weighty constitutional moment, and are so cleanly presented on the record below, that the case is a perfect vehicle for this Court's review. The decision by the single district judge below is incorrect and appellate review is needed. Only by granting certiorari can this Court ensure that its co-equal Branches of Government have the guidance they need to discharge their functions in ways that respect the constitutional rights of all individuals and organizations in the United States, which *amici* are charged with protecting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
Supreme Court of the United States

DEFENDERS OF WILDLIFE AND SIERRA CLUB,
Petitioners,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondent.

On Petition for a Writ of Certiorari to
The United States District Court for
The District of Columbia

BRIEF OF THE NATIONAL ADVOCACY CENTER OF THE SISTERS OF THE GOOD SHEPHERD, CENTER FOR BIOLOGICAL DIVERSITY, ENDANGERED SPECIES COALITION, GREENPEACE, INC., NATIONAL AUDUBON SOCIETY, INC., NATIONAL TRUST FOR HISTORIC PRESERVATION, NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION, SOCIETY FOR AMERICAN ARCHAEOLOGY, THE TOHONO O'ODHAM NATION, THE WILDERNESS SOCIETY, WORLD WILDLIFE FUND, AND UNITED CHURCH OF CHRIST AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* NATIONAL PUBLIC INTEREST AND RELIGIOUS ORGANIZATIONS, A FEDERALLY RECOGNIZED TRIBE, AND A CHURCH

INTERESTS OF *AMICI*

The organizations listed in the appendix, including a federally recognized tribe, a church, and nonprofit organizations supporting work in the fields of religion, environmental protection, historic and archaeological protection, submit this *amicus curiae* brief in support of the petition for a writ of *certiorari* filed by Defenders of Wildlife and Sierra Club ("Defenders").[1] *Amici* have substantial experience and interest in the laws that are the subject of the waiver exercised in this case, and in laws waived by the respondent under the same statute before and since the District Court's ruling in this case. *Amici* also have demonstrated interest and expertise regarding the natural and historic resources and religious interests protected by the laws waived.

This case raises the significant question of whether Congress can delegate to an executive branch official the authority to waive all laws – except for the Constitution – if that official finds in his or her sole discretion that such a waiver is necessary to ensure expeditious construction of barriers and

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[1] Counsel for respondent received timely notice of the intent to file this brief under Rule 37.2(a) and consented to it. All parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution in the brief's preparation or submission.

roads in the vicinity of the U.S. border with Mexico. Secretary of the Department of Homeland Security Michael Chertoff has now utilized such authority embedded in 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1103 note, five times. Secretary Chertoff's most recent waiver covered thirty-six laws for hundreds of miles of the border area, underscoring amici's concerns. The majority of the laws waived by Secretary Chertoff have as their purpose protection of the environment, wildlife, and historic and archaeological sites, as well as protection of Native American sacred sites, religious practices of Native American tribes, and religious practices of all faiths. But the waiver provision is not limited to such laws – it gives the Secretary unfettered discretion to waive any law.

Amici's brief is intended to give the Court a fuller understanding of the values and legal rights, including the rights of private property owners, that are at risk from the exercise of this extraordinary power to override all law, to highlight the societal interests protected by these laws and to describe some of the resources, places and practices that are directly threatened because of the waiver authority bestowed on the Secretary by a Congress abdicating its legislative responsibilities.

SUMMARY OF THE ARGUMENT

Amici believe this Court's review of Defenders' petition is critical to resolve the question of whether Congress has overstepped the Constitution's boundaries with regard to the separation of powers. Congress has put the executive branch in a position

to act in the role of a legislative body in a way that affects U.S. citizens' religious freedoms and their ability to protect and preserve our Nation's environmental and historic resources. Such a grant of authority is too broad, and violates the plain intention of the Framers of the Constitution in devising a system that separates the powers between the branches of government.

Over the past few decades, Congress has enacted an integrated set of statutes that reconcile the public interest in religious freedom, tribal practices and resources, and environmental protection and conservation with myriad other interests secured by governmental and private action. *Amici's'* purpose in submitting this brief is to provide this Court with a fuller understanding of the repercussions of giving an executive branch official the unfettered discretion and authority to waive these laws.

ARGUMENT

I. THIS CASE DEMONSTRATES WHY THE CONSTITUTIONALLY MANDATED SEPARATION OF POWERS IS ESSENTIAL TO THE RULE OF LAW IN THE UNITED STATES

Separation of powers is enshrined in the first three articles of the U.S. Constitution and virtually defines American governance. Over two hundred years of American jurisprudence have addressed the finer points of the legal relationship between the legislative and executive branches of government, but have not altered Congress's most fundamental role as the legislative body that enacts statutory law. The

virtue of this system rests, as Justice Marshall observed early in the country's history, on the proposition that, "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, (5 U.S.) 137 (1803). Inherent in this system is the concept that Congress legislates on particular subject matter, narrow or broad as it may be, that the laws are accessible to those affected by them, and that citizens can anticipate what laws will apply in a given situation.

The authors of the Constitution had very strong views about the necessity of separating the authorities of the three branches of government, as a direct result of their experience of the "History of repeated Injuries and Usurpations" amounting to an "absolute Tyranny" over the colonies, Declaration of Independence ¶2.. As grounds for forming a new nation, the first ten specific grievances enumerated in the Declaration of Independence as grounds for forming a new nation spelled out King George III's failure to respect either the legislative or judicial branches of government. Thus, in drafting the new nation's constitution, the founders were adamant that, "where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted . . . 'When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner." *The Fed-*

eralist No. 47, at 303 (James Madison) (C. Rossiter ed., 1961) (emphases in original).

The statutory provision at issue here epitomizes the mix of governmental functions that the founders tried to guard against. Indeed, Section 102 of IIRIA is unprecedented. The Congressional Research Service has not been able to identify any other provision in American history this broad and sweeping. See Memorandum from Stephen R. Viña & Todd Tatelman, Legislative Attorneys, Am. Law Division, Cong. Research Serv. On Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 2-4 (Feb. 9, 2005).

This unprecedented grant of legislative authority to an executive branch official is exacerbated by the lack of judicial review typically afforded citizens who are concerned about a federal agency's compliance with a statute. As Justice Thomas observed in his dissent in *Shalala v. Illinois Council on Long Term Health Care, Inc.*: "Our constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates or constitutional rights." 529 U.S. 1, 44 (2000) (Thomas, J. dissenting)." The long presumption of the availability of judicial review of agency actions was reinforced by this Court's interpretation of the Administrative Procedure Act. *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In this case Secretary Chertoff's waiver includes the Administrative Procedure Act. The lack of judicial review afforded to citizens and tribal, state, or local entities by Section 102(c) of the IIRIRA eliminates accountability over the Secretary's actions. Such a broad, sweeping grant of authority undercuts the "considerations of accountability and legislative supremacy,

ideas embodied in article I, and also to rule of law considerations, embodied in the due process clause . . . ." *See* S. Breyer, *et al.,* Administrative Law and Regulatory Policy 985 (5TH ed.. 2002).

II. PRIOR AND SUBSEQUENT USES OF SECTION 102 WAIVER AUTHORITY DEMONSTRATE THE WIDE-RANGING POTENTIAL HARM THAT CAN RESULT FROM ITS USE.

Amici wish to draw the Court's attention to the Secretary's waivers both before and after the filing of the Petitioner's lawsuit. These instances further illuminate the breadth and scope of the harm that derives from the unprecedented authority in Section 102(c) of the IIRIRA.

Secretary Chertoff first used Section 102(c) to waive seven environmental and historic preservation laws, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* and "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" those laws for a fourteen mile stretch of the southern border, beginning at the Pacific Ocean. 70 Fed. Reg. 55,622, 623 (Sept. 22, 2005). He used the waiver authority again to exempt compliance from seven environmental and historic preservation laws, the Administrative Procedure Act, 5 U.S.C. § 551, the Military Lands Withdrawal Act of 1999, Pub. L. 106-65, 113 Stat. 512, 885 (Oct. 5, 1999), and all derivative and related federal, state or other laws, regulations and legal requirements for an area within the Barry M. Goldwater Range in southwestern Arizona. 72 Fed. Reg. 2,535 (Jan. 19, 2007).

On April 1, 2008, the Secretary announced that he was signing two more waivers of law. One pertains to a levee-border barrier project in Hidalgo County, Texas. It waives twenty-two environmental and historic preservation laws, the Administrative Procedure Act, three laws relating to protection of Native American graves, religious practices and religious freedom, and the Federal Grant and Cooperative Agreement Act of 1997, 31 U.S.C. §§ 6303-6305, and all derivative or related Federal, State and other laws, regulations and legal requirements. 73 Fed. Reg. 18,294 (Apr. 3, 2008); 73 Fed. Reg. 19,077 (Apr. 8, 2008) (corrected version including geographic coordinates).

The second waiver covers large segments of the border area in California, Arizona, New Mexico and Texas, "encompassing roughly 470 total miles." Press Release, Dept. of Homeland Security, DHS Exercises Waiver Authority to Expedite Advancements in Border Security, (April 1, 2008), *available* at www.dhs.gov/xnews/releases/pr_1207080713748.shtm. The actions covered by this waiver include the construction of roads, fixed and mobile barriers, detection equipment of all types including radar and radio towers and lighting, and upkeep of these objects once constructed. 73 Fed. Reg. 18,293 (Apr. 3, 2008). And as the number of miles covered by the waiver increases, so too does the list of laws waived; to wit:

> The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
>
> The Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

The Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 *et seq.*

The National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*

The Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*

The Archaeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.*

The Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*

The Noise Control Act, 42 U.S.C. § 4901 *et seq.*

The Solid Waste Disposal Act, as amended by the Resources Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*

The Comprehensive Environmental Response, Compensation And Liability Act, 42 U.S.C. § 9601 *et seq.*

The Archaeological and Historic Preservation Act, 16 U.S.C. § 469 *et seq.*

The Antiquities Act, 16 U.S.C. § 431 *et seq.*

The Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 *et seq.*

The Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.*

The Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq.*

The Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*

The Wilderness Act, 16 U.S.C. § 1131 *et seq.*

The Federal Land Policy and Management Act, 42 U.S.C. § 1701 *et seq.*

The National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd-668ee

The Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

The California Desert Protection Act, Pub. L. No. 103-433, 108 Stat 4471 (1004), Title I §§ 102(29) and 103

The Otay Mountain Wilderness Act of 1999, Pub. L. 106-145, 102(29) and § 103 of the California Desert Protection Act, Pub. L. 103-433

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The National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, §§ 401(7), 403, and 404

The Arizona Desert Wilderness Act, Pub. L. 101-628, 104 Stat. 4469 (1990) § 301(a)-(f)

The Rivers and Harbors Act of 1899, 33 U.S.C. § 403

The Eagle Protection Act, 16 U.S.C. § 668 *et seq.*

The Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*

The American Indian Religious Freedom Act, 42 U.S.C. § 1996

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb

The National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*

The Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528-531

The Secretary has now swept aside virtually the entire panoply of the nation's environmental laws. From the safety and security of communities' drinking supplies in the Rio Grande to toxic leaching in groundwater in California – the law is gone. Historic and archaeological laws fare no better. The Administrative Procedure Act, a basic tool in the daily lives of federal institutions, purportedly no longer applies. And shockingly, laws passed to protect the religious freedom, sacred sites and graves of Native American tribes and the religious freedom of practitioners of all faiths, are waived. All of these laws are important. Below are a few examples.

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, one of the statutes waived in parts of California, Arizona, New Mexico and Texas, requires that the government not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. The government may overcome this prohibition only through a showing that the burden it wishes to impose is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Id.* at § 2000bb-1(b). This Court had occasion to underscore the fun-

damental centrality of the compelling interest test to the interpretation of this Act ("Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated application of the test, including at the preliminary injunction stage." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S.418,430(2006). This Court also observed in *Gonzales* that "We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one . . . . But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue." *Id.* at 439.

Neither *amici* represented here nor the public at large has been informed as to particular religious practices that compelled the Secretary to waive the RFRA. That, of course, is the problem. By granting the Secretary the enormous and unbounded authority to waive "all laws", Congress has transformed a cabinet post into a one man quasi-legislative body, able to eliminate the application of a law encompassing Constitutional standards without any specific explanation as to the rationale.

Laws protecting the country's historic heritage are also included in several of the waivers. Congress enacted the National Historic Preservation Act (NHPA) of 1966 in recognition that "historic properties significant to the Nation's heritage are being lost or substantially altered," and that "the preservation of this irreplaceable heritage is in the public interest." 16 U.S.C. §§ 470(b)(3), (b)(4). Section 106 of the NHPA is aimed at ensuring that federal agencies "take into account" the potential effects of their ac-

tions on historic properties. *Id.* § 470f. Although Section 106 is a procedural requirement, the fundamental goal of the Section 106 process is to "seek ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 C.F.R. § 800.1(a).

Similarly, the Archaeological Resources Protection Act (ARPA) of 1979 seeks "to protect archaeological resources on public lands and Indian lands," in part because "these resources are increasingly endangered," and "existing Federal laws do not provide adequate protection to prevent the loss and destruction of those archaeological resources and sites resulting from uncontrolled excavations and pillage." 16 U.S.C. §§ 470aa *et seq.* Enforced by criminal or civil penalties, ARPA prohibits "excavat[ion], remov[al], damage, or attempt to excavate, remove, damage, or otherwise alter[ation] or deface[ment] [of] any archaeological resource on public lands or Indian lands" unless authorized by a permit issued pursuant to Section 4 of ARPA. *Id.* § 470ee. ARPA applies to "any officer, employee, agent, department, or instrumentality of the United States, of any Indian tribe, or of any State or political subdivision thereof." *Id.* § 470bb(6).

Congress passed the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. §§ 3001 *et seq.*, in recognition of the significance and loss of Native American human remains and other objects of funerary or cultural significance. Section 3 of NAGPRA sets forth requirements for regulating the intentional or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are discovered on Federal or tribal lands, including a process for ceasing activities when human remains or ob-

jects identified in the statute are discovered and a process for consulting with potentially interested Tribes. 25 U.S.C. § 3002(d).

Important historic, cultural, and archaeological resources within the area of the proposed border fence are at risk of being lost or irreparably destroyed by the fence's construction and on-going activities associated with the border fence. For example, in New Mexico, dozens of archaeological sites of both prehistoric Native American and Anglo-European origin have been identified in a one hundred foot wide corridor stretching more than 123 miles along the border between Anapra and Antelope Wells. The New Mexico State Historic Preservation Officer has examined forty-eight of these sites and determined that ten of them are eligible for listing in the National Register of Historic Places. Of even greater concern, however, are the estimated hundreds, if not thousands, of historic and cultural resources that have not yet been identified. Waiving historic preservation laws, such as NHPA, ARPA, and NAGPRA, will have the effect of potentially destroying or damaging known and as yet unknown historic, cultural, and archaeological resources without any consideration of their importance and/or effort to identify and protect such resources.

The Tohono O'odham Nation has extremely strong interests in the seventy-five mile construction zone along its southern border with Mexico. In this area, the Nation exercises governmental authority over the land and resources within its reservation. The latest waiver issued by Secretary Chertoff allows construction to proceed without compliance with the environmental requirements that the Nation has enacted into tribal law, requirements that

are in support of the federal laws which have just been waived.

The type of harm that can occur as a result of these waivers has already been suffered by the Nation. After issuance of the Goldwater Range waiver in 2007, a Boeing Company subcontractor widened a fifteen-mile stretch of the El Camino del Diablo Road without first performing an archaeological clearance and without informing the federal land management agency.[2] Two known Hohokam archaeological sites were damaged from the blading.

In areas where the latest 470-mile waiver has been issued, known archaeological sites of importance to the Nation are threatened. For example, in the area between Naco and Douglas in eastern Arizona, there are identified archaeological sites. However, the effect of the waiver is to remove requirements that these sites be cleared and excavated before construction proceeds. Damage from construction equipment is already known to have occurred. In a field visit in October, 2007, fragments of human remains were observed in the tire tracks of the heavy construction equipment.[3] If archaeological clearance had been performed in advance, as required by federal law, such human remains would have been retrieved before the construction equipment arrived.

Virtually all of the nation's protection for wildlife, air, and water, protection from toxics and other

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[2] The El Camino del Diablo Road is listed on the National Register of Historic Places.

[3] Personal communication with Peter Steere, Cultural Resources Manager, Tohono O'odham Nation, April 10, 2008.

forms of pollution, is eradicated by this later waiver. For example, by waiving the Endangered Species Act, Homeland Security is free to construct fences without consulting with the U.S. Fish and Wildlife Service, and without adding needed protective measures for countless endangered or threatened species. A fence divides populations and prevents species from reaching needed sources of water. It will, for example, prevent the small remaining population of ocelots in the U.S. from swimming across the Rio Grande to mate. Mexican grey wolves, peninsular bighorn sheep, Sonoran pronghorn, and lesser long-nosed bat, to name, are likely to be adversely affected. The future of migratory animals, such as a free-ranging bison herd that grazes in the Chihuahuan Desert grasslands and migrates between Mexico and New Mexico, may be compromised. Black bears blocked by a border fence may suffer loss of genetic diversity. Other identified problems include reduction in aquifer recharge capacity, modification of drainages, public health problems, soil compaction, introduction of non-native species and a myriad of other concerns. A. Cordova, C.A. de la Parra, A Barrier to our Shared Environment, (1st Ed. 2007).

The Sabal Palm Grove Audubon Sanctuary in Texas is a privately owned but publicly accessible treasure that will be significantly affected by the proposed construction. Harboring one of the few remaining stands of the palm forests that greeted Spanish explorers in the sixteenth century (the Rio Grande was originally named the "Rio de las Palmas"), all of the Audubon Sanctuary's 527 acres lies south of the planned fence. Over 280 species of birds, mammals and other animals, including two federally endangered and nineteen state threatened species

live in the Sanctuary. And the impacts will not be limited to wildlife. This Sanctuary and other special places in the Rio Grande Valley have stimulated a flourishing ecotourism business, attracting birders from the world. Barry, Dan, *A Natural Treasure That May End Up Without a* Country, N.Y. Times, April 7, 2008. The private property interests of the Sanctuary and the economy of the region will be badly affected by Congress' willingness to allow the Secretary of Homeland Security waive laws designed to protect these interests.

Further, the purported scope of these waivers cannot be accurately defined. While federal statutes are named, all of the waivers also purport to include "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of those laws." It is impossible to know in advance what this provision is supposed to cover. Does it include sanitation disposal laws in Del Rio, Texas? Does it purport to waive government-to-government relationships with the numerous federally and state recognized tribes whose lands and interests are adjacent to the southern border? What of the rights of over 80,792 individual Native Americans who live on the U.S. side of the border region, and their rights under U.S. treaties and laws? U.S. Census, 2000, *available at* http://factfinder.census.gov. The Secretary's sweeping use of this unprecedented authority makes it impossible for a citizen to know which laws are being waived. This unsettling result dramatically demonstrates the difficulty with Congress' grant of legislative-like authority to the Secretary of Homeland Security.

III. THE LAWS WAIVED IN THIS CASE PROTECT IMPORTANT SOCIETAL INTERESTS

A. THE RESOURCES AT RISK IN THIS CASE ARE HIGHLY SIGNIFICANT TO THE REGION AND THE NATION

The San Pedro River, one of the last free-flowing rivers in the Southwest, cuts a narrow, undulating swath of green and gold through the Sonoran desert. Within the last 150 years, more than 80 species of mammals have been identified in the area, "one of the richest assemblages of land mammal species in the world."[4] The San Pedro also provides habitat for approximately three hundred and ninety bird species, including about a hundred species that use the area for nesting purposes, and millions of migrating songbirds. Thomas Leskiw, "River Lost, River Found: The Colorado & San Pedro Rivers," Terrain.org., No. 16, Spring/Summer 2005, *available at* http://www.terrain.org/essays/16/leskiw.htm.

These characteristics have made the San Pedro riparian area one of the country's most important birding areas. It has been designated as the National Audubon Society's first Globally Important Bird Area and a world heritage natural area. A wide variety of mammals, reptiles and amphibians also in-

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[4] San Pedro Expert Study Team Report: Sustaining and Enhancing Riparian Migratory Bird Habitat on the Upper San Pedro River, Executive Summary (March 1999), in Secretariat of the Commission on Environmental Cooperation, *Ribbon of Life: An Agenda for Preserving Transboundary Migratory Bird Habitat on the Upper San Pedro River* (June 1999), at 16, *available at* http://www.cec.org/files/pdf/SP-ENGL_EN.PDF.

habit the area, with some mammals apparently traversing the border back and forth between Mexico and the United States. Christine C. Hass, *Landscape fragmentation and connectivity for carnivores in the Upper San Pedro Basin*, Fort Huachuca Wildlife Office, Fort Huachuca, Arizona. The wildlife values of the San Pedro riparian area have stimulated a robust business in ecotourism, with estimates of the total economic impacts to the local economy ranging into millions of dollars. Julia Leones, "*Tourism in Rural Arizona*", Community Development Issues (University of Arizona College of Agriculture, Tucson, AZ), Apr 1993 *available at* http://www.ag.arizona.edu/arce/pubs/cdnews/VOl1No.1.pdf.

It was for all of these reasons and more – "to protect the riparian area and the aquatic, wildlife, archaeological, paleontological, scientific, cultural, education, and recreation resources of the public lands surrounding the San Pedro River" – that Congress established the San Pedro Riparian National Conservation area. In the Arizona-Idaho Conservation Act of 1988, Congress directed the Secretary of the Department of the Interior to allow only uses of the area that would "further the primary purposes for which the conservation area is established." 16 U.S.C. § 460xx-1(b).

The San Pedro river valley is also within the aboriginal territory of the Tohono O'odham Nation and other Indian tribes in Arizona. The archaeological sites encountered during the construction of the fence in this area contain prehistoric artifacts and human remains of the Hohokam, who are the ancestors of the Tohono O'odham, and of the Mogollon culture to the north.

B. THE UNDERLYING LAWS AT ISSUE IN THIS CASE DO NOT PREVENT THE REALIZATION OF BORDER SECURITY, AND THEIR PROCEDURES GUARD AGAINST UNINTENDED CONSEQUENCES

This case demonstrates the serious effects of Section 102(c) of the IIRIRA. The federal action at issue is the transfer of a perpetual right of way from the Bureau of Land Management (BLM), an agency within the Department of the Interior, to the Department of Homeland Security (DHS), for construction of a barrier at the border within the San Pedro Riparian National Conservation Area. After pursuing administrative remedies, petitioners filed this action, challenging the Bureau of Land Management's compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* and the Arizona-Idaho Conservation Act of 1988, 16 U.S.C. § 460xx-1

In their initial pleadings, Petitioners articulated extensive damage that could occur if DHS proceeded with its proposed actions of clearing and grading a sixty-foot-wide strip of land along the southern boundary of the San Pedro Riparian National Conservation Area, constructing new roads, and building permanent and temporary vehicle barriers and pedestrian fencing. These proposed actions were to cross sixty-six ephemeral drainages, as well as the San Pedro River BLM's limited environmental analysis predicted impacts including erosion, alteration in stream channel morphologic stability and impacts on the San Pedro River's hydrology and stabil-

ity, as well as a variety of adverse effects on wildlife, including species listed under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* Bureau of Land Management, Tucson Field Office, Border Fence Environmental Assessment, Aug. 2007 (EA) at 6-13. Petitioners argued that under NEPA, these types of impacts merited a comprehensive and careful analysis before proceeding.

Petitioners also argued that a broader, comprehensive analysis was required under NEPA to assess the effects, including the cumulative effects, of the barriers that were simultaneously being constructed or proposed for construction elsewhere along the entire Arizona-Mexico border. Petitioners pointed to this Court's articulation in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), defining a "proposal" for purposes of NEPA as a "regional plan of development . . . [which] define[s] fairly precisely the scope and limits of the proposed development of the region." 427 U.S. at 401-02. The Council on Environmental Quality's implementing regulations similarly directs that a single course impact statement be prepared for "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action . . . " 40 C.F.R. § 1502.4(a).

District Court Judge Huvelle found that plaintiffs had demonstrated a substantial likelihood of success on the merits with respect to the NEPA claim and issued a temporary restraining order (TRO). Specifically, she found that BLM's discussion of cumulative impacts suffered from both factual and legal flaws, and that the agency's failure to even acknowledge the potential cumulative impacts of anything outside of the San Pedro watershed rendered

the environmental assessment inadequate. TRO Hr'g Tr. 92-94, Oct. 10, 2007.

Sixteen days later, Secretary Chertoff waived not only the laws upon which plaintiffs' lawsuit was based, but seventeen other statutes. 72 Fed. Reg. 60,870 (Oct. 26, 2007). His notice specifically referenced Judge Huvelle's Order although neither he nor the Department were parties to the lawsuit. The district court's decision to uphold the constitutionality of his action preceded Petitioners' pending petition for *certiorari*. Under Section 102(c) of the IIRIRA, this Court is the only venue for review of an interlocutory or final judgment, decree or order of a federal district court. 8 U.S.C. § 1103 note.

It is, of course, impossible to predict the outcome of the litigation had Secretary Chertoff not waived NEPA and nineteen other laws. All we know is that Judge Huvelle found enough merit in Petitioner's claim under NEPA to issue a TRO. The normal course of litigation was cut off by the Secretary's execution of the waiver.

Because NEPA is the law that was the basis of the TRO, it is worth reflecting on its purpose and process. This Court has long recognized that compliance with NEPA's procedural requirement serves two important purposes: (1) to inform the agency decisionmaker who, as the result of NEPA, "will have available, and will carefully consider, detailed information concerning significant environmental impacts . . . . " before, not after, he or she makes a decision with serious consequences. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989), citing *Baltimore Gas & Electric Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983)

and *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981), and (2) provide a systematic way of engaging the public and other government agencies, whether federal, state, tribal or local, in the analysis of the proposed action. *Id.* As the Court stated in *Robertson*:

> Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. . . .
>
> Publication of an EIS [environmental impact statement], both in draft and final form, also serves a larger information role. It gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process [cite omitted], and, perhaps more significantly, provides a springboard for public comment, see L. Caldwell, Science and the National Environmental Policy Act 72 (1982).

Robertson at 349-50.

Compliance with NEPA would not prevent DHS from achieving its goal of attaining greatly improved security at the U.S.-Mexico border. This is particularly true because of NEPA's requirement to identify and analyze the effects of alternatives to the proposed action. 42 U.S.C. § 4332(c) (iii); 40 C.F.R. § 1502.14 (2007).

The evaluation of reasonable alternative ways of achieving an agency's purpose and need is, in the words of the Council on Environmental Quality's

regulations implementing the procedural requirements of NEPA, "the heart of the environmental impact statement" process. 40 C.F.R. § 1502.14. Without the alternatives requirement, the NEPA process would simply document the anticipated effects of a decision. Admiral James Watkins, Secretary of Energy under President George Herbert Walker Bush, emphasized this quintessential benefit of the NEPA process when he testified before Congress about his decision regarding the selection of a tritium production technology: "Thank God for NEPA because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country." Testimony of then Secretary of Energy Admiral James Watkins before the House Armed Services Committee, Congress (Apr. 28, 1992) Transcript, p. 15. The systematic opportunity for both private property owners as well as those with interests in public lands along the border to have reasonable alternatives considered by the Secretary are truncated by waiver of the NEPA process.

The application and enforcement of NEPA has, in fact, lead to the use of numerous viable alternatives for constructing vehicle barriers on the 75-mile border within the Tohono O'odham Nation. Customs and Border Protection has estimated that there are more than 7,200 illegal entries on the Nation daily and the Nation has repeatedly supported a range of border security enhancements, including integrated radar-camera systems, tactical checkpoints, and the construction of the vehicle barriers. These strategies have been employed in a manner largely consistent with federal legislation designed to protect natural and cultural resources and human remains. These

measures have not prevented the construction of barriers and roads on the Nation. In this remote desert, which has been identified as one of the most heavily trafficked drug and human smuggling corridors on the border, compliance with the law and alternative measures have not thwarted the DHS mission, but ignoring the law now will certainly expose these resources to significant harm.

Implementation of NEPA to the proposed barriers in the San Pedro Riparian area would not by any means bar DHS from proceeding to what it would consider a successful conclusion. Rather, a comprehensive analysis of alternatives might reveal a less damaging, more efficient means of achieving enhanced border security.

Finally, a concern may be raised about the time necessary to complete the NEPA process in relationship to the goals set by the Secretary for completion of construction by a date certain (although note that there is no statutory deadline). There are several reasons this issue should not unduly concern the Court. First, the goal of enhancing border security has been the subject of government deliberation and action for a number of years. Due diligence would have suggested commencing the NEPA process years ago for these activities. General Accounting Office, *U.S.-Mexico Border: Issues and Challenges Confronting the U.S. and* Mexico, NSIAD-99-190, July 1, 1999. Second, timeframes may be reduced upon "a showing by the lead agency of compelling reasons of national policy". 40 C.F.R. § 1506.10(d). And finally, should the Department believe that it faces emergency circumstances, it may consult with the Council on Environmental Quality about alternative ar-

rangements to the usual procedure. 40 C.F.R. § 1506.11.

CONCLUSION

In sum, *amici* urge this Court to grant the write of certiorari.

Respectfully submitted

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APPENDIX

APPENDIX

Description of *Amici*

The National Advocacy Center of the Sisters of the Good Shepherd offers education through processes and strategies that address social justice issues and advocates for the transformation of society to the benefit of all people. The Center reflects the spirituality, history and mission of the Sisters of the Good Shepherd, working in solidarity with the disenfranchised – particularly families, women, and children.

The Center for Biological Diversity is a national nonprofit conservation organization that utilizes science, law and creative media to secure a future for all species hovering on the brink of extinction. For more than a decade, Center members and staff have worked to conserve imperiled species and ecosystems along the Arizona-Mexico border, with a particular focus on the San Pedro River watershed. Construction of a border fence in the absence of any compliance with federal environmental or conservation laws will cause extensive damage to the San Pedro River and imperil many species that rely on it for their survival.

The Endangered Species Coalition is a national network of approximately four hundred conservation, scientific, religious, sporting, outdoor recreation, business and community organizations working to protect our nation's disappearing wildlife and last remaining wild places. Through education, outreach and citizen involvement, the Endangered Species Coalition works to protect endangered species and the special places where they live. The Endangered

Species Coalition specializes in grassroots organizing to mobilize citizens to participate in the democratic political process.

Greenpeace, Inc. ("Greenpeace") is a non-profit organization incorporated in California, with headquarters located in Washington, D.C. and offices in Alaska and California. Greenpeace's mission is to raise public awareness of environmental problems and promote changes that are essential to a green and peaceful future. Greenpeace has been a leading advocacy organization for more than two decades, working on many environmental issues, including climate, fisheries, toxic substances and the protection of wildlife and fauna. During this period, Greenpeace has been a plaintiff in multitude of lawsuits involving the National Environmental Policy Act of 1969, the Administrative Procedures Act and other environmental laws.

The National Audubon Society, Inc., a not-for-profit corporation organized under the laws of the State of New York, has more than one million members and supporters and a presence in all 50 states through its 23 state offices, more than 450 certified chapters, nature centers, sanctuaries, and education and science programs. Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity.

The National Trust for Historic Preservation (National Trust) is a private nonprofit organization chartered by Congress in 1949 "to facilitate public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 16 U.S.C. §§ 461, 468. With

the strong support of more than 277,000 members around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust also has a role in overseeing the implementation of the National Historic Preservation Act (NHPA), since Congress designated the Chairman of the National Trust as a member of the Advisory Council on Historic Preservation, the independent federal agency responsible for implementing and enforcing the NHPA. *See id.* § 470i(a)(8). The National Trust's expertise on historic preservation law is widely recognized, and the Trust has participated as *amicus curiae* before this Court in a variety of cases involving historic preservation issues, ranging from constitutional cases to issues of statutory interpretation.

The Natural Resources Defense Council, Inc. ("NRDC") is a national, not-for-profit membership organization committed to the preservation, protection, and defense of the environment, public health, and natural resources. For over thirty-five years, NRDC has engaged in scientific analysis, public education, advocacy, and litigation on a wide range of environmental and health issues. NRDC has more than 420,000 members nationwide.

The National Wildlife Federation ("NWF") is one of the nation's largest non-profit conservation advocacy and education organizations. It has more than one million members, and has affiliate organizations in 47 states and territories. NWF's mission is to inspire Americans to protect wildlife for our children's future.

The Society for American Archaeology is an international organization that, since its founding in 1934, has been dedicated to research about, and interpretation and protection of, the archaeological heritage of the Americas. With more than 7,200 members, the Society represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. The Society has members in all fifty states as well as many other nations around the world.

The Tohono O'odham Nation is a federally recognized Indian tribe whose people have lived since time immemorial within the Sonoran Desert in the area now known as southern Arizona and northern Sonora, Mexico. The Tohono O'odham or "desert people" and their Hohokam ancestors farmed southern Arizona watercourses and river valleys as far east as the San Pedro River. The Nation's current reservation comprises approximately 2.8 million acres, including 75 miles along the United States-Mexico border, with U.S. and Mexican O'odham communities divided by the boundary.

The Wilderness Society is a not-for profit public interest membership organization headquartered in Washington, D.C. Founded in 1935, the Society and its approximately 250,000 members and supporter are dedicated to protecting a national network of wild lands and fostering an American land ethic. The Society works to ensure wise management and protection of America's public lands, including our national forests, national parks, wildlife refuges, and lands administered by the Bureau of Land Management. The Society fulfills its mission through public education, analysis and advocacy.

World Wildlife Fund is an international nonprofit organization, headquartered in Washington, D.C., with a presence in more than 100 countries throughout the world, and a membership of 1.2 million in the United States and almost 5 million globally. WWF's mission is the conservation of nature -- using the best available scientific knowledge and advancing that knowledge where possible, to preserve the diversity and abundance of life on Earth. WWF has identified 19 terrestrial and marine ecoregions around the world that are top priorities for achieving this goal. One of those 19 is the Chihuahuan Desert, which includes habitat comprising public lands and populations of endangered and threatened species affected by this case. WWF has been working in the region since 1997 to restore freshwater ecosystems, conserve grasslands and wetlands, halt illegal wildlife trade, protect large predators such as the jaguar, and promote best management practices in Big Bend National Park.

The United Church of Christ is a Protestant Christian denomination, headquartered in Cleveland, Ohio, with 1.2 million adherents. The Church is a direct descendant of the Congregational faith of the Mayflower Pilgrims. More than 600 of our 5,600 congregations were founded before 1776 and eleven signers of the Declaration of Independence belonged to one of our predecessor bodies.